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ABSTRACT

Computers, microfilm, cable television, satellite communications, photocopiers and other technical developments brought about general revision to U.S. Copyright Law, which was enacted in 1976 and became effective on January 1, 1978. The 17 articles in this issue of The Bookmark consider how the law has resolved the main problems: (1) "Libraries, Users and Copyright: Proprietary Rights and Wrongs--Introduction" (John Rothman); (2) "Living with the Copyright Law: Difficult, Yes. Impossible, No." (R. Bruce Rich); (3) "Section 108: Expanding the Librarian's Traditional Role" (Marilyn J. Kretsinger); (4) "News from the Courts" (Joanne D. S. Armstrong); (5) "Collective Licensing as a Practical Solution" (Joseph S. Alen); (6) "Copyright and Preservation: An Overview" (Robert L. Oakley); (7) "Fax--A Special Case" (David James Ensign); (8) "The Myth of Library Immunity from Copyright Infringement" (Randall Coyne); (9) "Fair Use and Unpublished Materials" (Sara Robbins); (10) "Circulating Media in Public Libraries: What Is Legal? What Is Safe?" (Mary Keelan); (11) "Databases and Their Offspring" (Alan R. Greengrass); (12) "I'm Not My Brother's Keeper: Why Libraries Shouldn't Worry Too Much about What Patrons Do with Library Materials at Home" (Mary Brandt Jensen); (13) "The Federal Government's Electronic Data Files: Questions of Access Rights and Cost" (Susan L. Dow); (14) "The International Scene" (Joseph S. Alen); (15) "Copyright Research Basics: How To Help Patrons Locate the Copyright Information They Need" (Joanne D. S. Armstrong); (16) "Public Policy Perspectives on Intellectual Property and the Public Good" (Michael J. Remington); and (17) "What Reference Librarians Need To Know" (Deirdre C. Stam). An article on the White House Conference on Library and Information Services Task Force by Helen F. Flowers is also included. (KRN)

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Winter 1992
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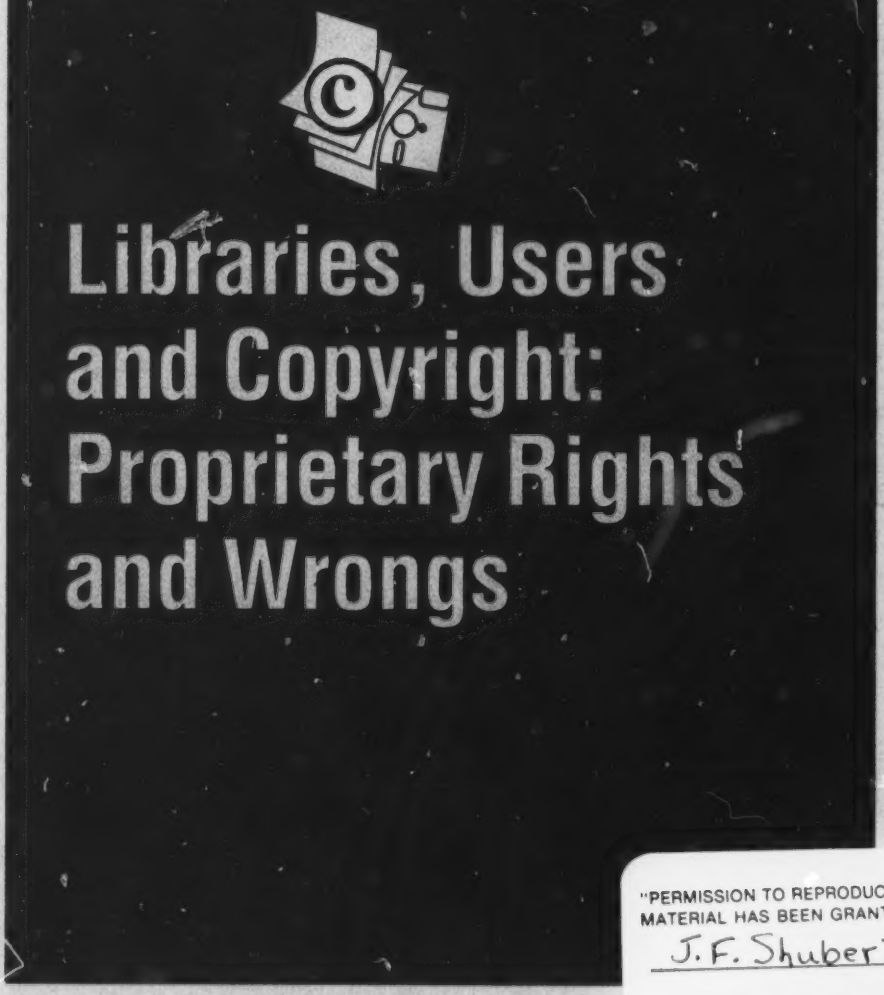

Libraries, Users and Copyright: Proprietary Rights and Wrongs

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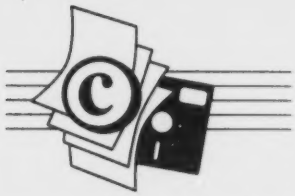

The Bookmark

LIBRARIES, USERS AND COPYRIGHT: PROPRIETARY RIGHTS AND WRONGS

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Joseph F. Shubert and
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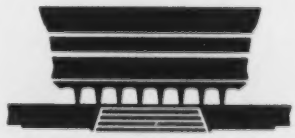

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LIBRARIES, USERS AND COPYRIGHT: PROPRIETARY RIGHTS AND WRONGS

Introduction By John Rothman, Issue Editor

Public Law 94-553, "An act for the general revision of the Copyright Law, Title 17 U.S.C.," was enacted in October 1976 and became effective on January 1, 1978. It was the first general overhaul of the copyright statute in almost 70 years, brought about mainly by technical developments in the two decades following the Second World War, the era of the "Information Explosion": computers, microfilm, cable television, satellite communications, digital networks, tape recorders and, of course, photocopiers. All these had changed the way information was being recorded and disseminated, had increased vastly the quantity and variety of information products offered and demanded in the marketplace, and had caused problems and controversies in dealing with the proprietary rights claimed by authors and publishers, the access and use rights of the public, and the "middleman" role of libraries.

Years of grappling with these problems by Congressional committees, the Copyright Office, CONTU (the awkwardly named Commission on New Technological Uses of Copyrighted Works), diverse organizations in the information professions and industry, and the courts had gone into the making of the new law. Summer 1979 seemed to be a good time for *The Bookmark* to take a look at it and its effects on the library community; the issue entitled "Copyright and Critical Issues" was the result.

Winter 1992 appears to be a good time to take a second look, and this issue is the result.

Here we consider whether the 1976 law has resolved the main problems on which it focused and how libraries have been affected by the new rules and procedures it mandated. But mainly we consider several questions about what has happened since: Have libraries been affected by any litigation brought under the new law? Has the proprietary rights landscape been altered further by astounding technical developments of the 1980s, such as compact disks, personal computers, facsimile transmission, video recorders and disks, and graphics terminals and software? How are libraries being affected? We ask these and other questions, and attempt some answers.

LIBRARIES' ROLE IN THE COPYRIGHT ARENA

Throughout, we address an underlying issue: What are the nature and extent of the libraries' involvement in the copyright arena? Are libraries just bystanders in the tug-of-war between two market forces — creators and users, suppliers and consumers — or are they victims, or are they and should they be active participants?

The tug-of-war stems from a terse paragraph in the U.S. Constitution that gives Congress the power, among others:

> "To promote the progress of Science and useful Arts, by securing for limited Times to Authors "and Inventors the exclusive Right to their respective Writings and Discoveries."[1]

The Framers had a twofold purpose: first, to stimulate artistic and literary creativity and scientific research and inventiveness by rewarding the creators with temporary exclusive rights to exploit their creations, and, second, to assure to the public the benefit of these creations after the time limit has been reached and, conditionally, even before that. It was what a report by the Office of Technology Assessment calls "the intellectual property bargain":

> "In exchange for granting authors and inventors exclusive rights in their writings and inventions, the American public is to benefit from the disclosure of inventions, the publication of writings, and the eventual return of both to the public domain."[2]

A recent opinion by a U.S. Court of Appeals put it more forcefully:

> "...the concept of copyright...is the grant of an exclusive right to authors to reproduce their writings for sale during a limited period of time in exchange for the author's making the work available to the public in order to promote learning...It is axiomatic that learning relative to a work requires access to the work in which the ideas are included...during the limited period...[and] that ultimately copyrighted works enter the public domain where they become freely accessible to the public."[3]

Libraries are the principal repositories of works both during the term of copyright and after they have entered the public domain. Libraries are the principal place where the information-seeking public, whether casual browsers or professional researchers, obtains access to the sources of information. Libraries must serve that

public, but within the limits set in the grant of proprietary rights. Thus, they surely have a major role in this arena.

Libraries were major parties in the controversy over photocopying in the early 1970s, but since that time they have been largely on the sidelines, except for the Library of Congress and a few professional organizations. For the latter, "involvement" has generally meant forming a task force of a few interested members to monitor developments, devoting a convention session to the topic (especially if a prominent attorney could be induced to be a speaker), and perhaps — not very frequently — offering a workshop. Librarians seem to have adopted the attitude advocated by Richard De Gennaro, who in 1977 deplored "the continued preoccupation of the entire profession with the copyright issue" and held that "Most librarians...need not try to master the intricacies of the new law or make elaborate preparations to implement it...(but) should set the copyright issue aside and turn...to other more critical matters."[4]

We must consider whether this is still the proper attitude in light of the current state of technology and the aggregate of decisions by policymakers and the judiciary over the past 15-odd years.

QUO VADIMUS?

Technology has certainly been on the side of the user. The sources of information have proliferated and spread over wide geographic areas and a variety of media. It has become much easier and much cheaper to access information, even over great distances; to extract and copy information from them; to edit and otherwise alter the information and to combine it with material from other sources; to transfer the product from one medium to another; and to share it with others.

Technology has certainly been on the side of the user.

The courts and the legal profession, on the other hand, have generally leaned toward the protection of proprietary rights; as the U.S. Court of Appeals put it, "Frequently, the court is presented with a 'good guy' copyright owner and a 'bad guy' ('pirate') copyist. As a result, the interest of the public in the free flow and availability of ideas is often overlooked."[5]

The information-using public — and that includes academicians and others who, as authors, may be copyright holders themselves — is by and large heedless of the restrictions imposed by proprietary rights, and apt to interpret almost any use as fair. A public opinion survey commissioned by the OTA found that any copying or other use of copyrighted material other than "commercial, for-profit activity or willful, active attempts to avoid paying for something" is considered acceptable. "In general, the public seems to be in support of laws regarding criminal infringement or access, and competitive or institutionalized copying activities, but it withholds support for prohibitions on civil infringement or private use copying behavior."[6] In Anne Branscomb's understatement of her own findings: "Public sympathy seems tilted in the direction of considerable leniency in the utilization of the work product of others."[7]

Creators of intellectual property tend to be more militant in asserting their rights.

The situation in which libraries now find themselves may be described thus: Authors, publishers and other creators of intellectual property tend to be more militant in asserting their rights and more restrictive about access and use. The courts tend to support them, and the law has eased the requirements for claiming copyright and protecting the works. However, technology has vastly increased the range and variety of media and forms in which works may be offered and the facilities for access, use and copying. The public is taking full advantage of all the new forms and gadgets without much regard for proprietary rights; preventing and prosecuting infringing uses are cumbersome and costly.

The primary mission of libraries, to provide optimal access to the largest possible range of sources of information to all comers, has not changed. The changes wrought by technology — new media, new forms, new means of access and use — have greatly enhanced the libraries' opportunities for service, but have also resulted in many new problems, including those involving copyright. And all this may compel librarians to shoulder additional and rather daunting responsibilities.

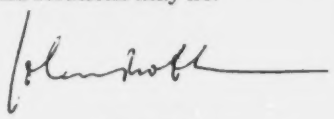
In regard to proprietary rights, librarians 25 years ago needed only to decide if a work could circulate or had to be used in the library, and if rare or fragile works necessitated special restrictions.

Fifteen years ago, decisions about compliance with the new rules on copying had to be added, and generally involved no more than notices at the photocopiers and elsewhere, and whether to install coin-operated machines.

Now decisions need to be made, in addition, about lending audio and video cassettes and software packages, and about showing films and videos, and about

remote access to online databases from single or a network of user work stations, and whether access will include "downloading." And, since librarians now can rarely control the making of copies by direct, on-site supervision, they must decide to what extent they are obligated, legally or morally, to safeguard the rights of the copyright holders and what actions, if any, they ought to take to protect their users, their library and themselves against possible charges of infringement.

In this issue, we raise these and other questions, discuss the problems, and try, at least, to indicate the path to where the answers and solutions may lie.



Issue Editor

John Rothman, *now a consultant in information and archival services, served* The New York Times *for nearly 45 years as director of its corporate archives, Director of Information Services, creator of* The New York Times Information Bank *and editor of* The Times Index. *Dr. Rothman chaired the Regents Advisory Council on Libraries for two terms and was a trustee of METRO for 17 years, during two of which he served as board president. His 20-year involvement with copyright matters includes membership on the Information Industry Association's proprietary rights committee and on the advisory board of the Copyright Clearance Center, as well as work with CONTU as a "lay expert."*

REFERENCES

1 Article I, sec. 8, par. 8.

2 U.S. Congress, Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information*, Washington, DC, U.S. Government Printing Office, April 1986, pp. 188-193. Cf. *ibid.*, pp. 38-39.

3 *Cable News Network, Inc. v Video Monitoring Services of America, Inc.* 940 F.2d 1471, 1478 (and note 12), (11th Cir. 1991).

4 Article in *American Libraries*, v8, n8, September 1977, pp. 430-435, as quoted in *The Bookmark*, v38, n4, Summer 1979, p. 166. A contrary view was presented by Nancy H. Marshall, then chair of A.L.A.'s Ad Hoc Copyright Subcommittee, in the same issue of *The Bookmark*, pp. 167-171.

5 Note 3, *supra*, at 1483. Note that three major U.S. Supreme Court decisions in copyright cases (The Nation, Salinger and New Era) upheld the copyright claims of the plaintiffs.

6 *Op cit.*, p. 209.

7 Branscomb, Anne W., *Nurturing Creativity in a Competitive Global Economy: Intellectual Property and New Technologies*, Cambridge, MA, Harvard University (Program on Information Resources Policy), 1988. p. 6.

John Rothman has worked with a dozen experts on various aspects of copyright law and library services to examine how copyright developments are affecting libraries and their users. We are proud to publish these excellent papers.

In addition to the several articles that Dr. Rothman has assembled on the theme, "Libraries, Users and Copyright: Proprietary Rights and Wrongs," this issue includes two other timely and important articles. One, by Professor Deirdre C. Stam of the School of Library and Information Science at Catholic University of America, deals with library education for reference work. Her overview and the excerpts from discussions with practicing reference librarians in six libraries in the Syracuse area provide important insight on what practicing librarians indicate they need and want to know to do their jobs well.

The other article, by Helen F. Flowers, reports on the White House Conference on Library and Information Services Task Force. In July 1991, the New York Delegation to the White House Conference elected Dr. Flowers and John O'Rourke, Superintendent of the Fulton City Schools, to represent New York on the national Task Force.

Editor

LIVING WITH THE COPYRIGHT LAW: DIFFICULT, YES. IMPOSSIBLE, NO.

By R. Bruce Rich

As a lawyer specializing in copyright matters, I am continually struck by how few precise answers exist to so many issues that librarians and other information users confront daily in relation to their use of copyrighted materials. However, when one recognizes the assigned function of copyright in our society and the essential dual role it performs, it becomes clearer why a fair degree of uncertainty is inherent in this body of law. That uncertainty, while at times unsettling, also affords creators and users alike the opportunity to fashion solutions that fit the needs of our ever-changing information society.

The United States Supreme Court has put the competing interests well, observing in the *Sony Betamax* case that the task assigned Congress by the Constitution in crafting both copyright and patent legislation[1] "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand...."[2]

Librarians, who serve as gatekeepers to the world of copyrighted material, live every day with the tension that unavoidably exists in the copyright law's effort to strike a proper balance between these competing concerns. The challenge for librarians — as for others who regularly interact with this body of law — is to obtain a working familiarity with its basic concepts and principles; to develop procedures to assure the proper application of those concepts and principles to the particular environment in which librarians operate; to stay abreast of developments in the law as they occur; and to recognize (but not despair) that there do not, and likely never will, exist answers to all open questions.

THE EXCLUSIVE RIGHTS CONFERRED BY THE COPYRIGHT ACT AND THEIR LIMITATIONS

The current copyright law, embodied in the Copyright Act of 1976, 17 U.S.C., § 101 *et seg.* (the "1976 Act"), prescribes that a wide range of "original works of authorship," if "fixed in any tangible medium of expression," are entitled to copyright protection. The categories of works of authorship embrace: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. The definition of "literary works," as set out in the accompanying footnote,[3] gives some flavor for the breadth of creative endeavors intended to be swept within the scheme of the Act.

A number of exclusive rights are granted to owners of copyrighted materials, including the sole right to reproduce the works in copies; to distribute copies to the public "by sale or other transfer of ownership, or by rental, lease, or lending"; and in many instances, to perform or display the copyrighted works publicly.

These exclusive rights are not, however, without limits; for librarians, the most important limits are found in § 107 and § 108 of the Act. § 107 is the general "fair use" provision, a safe harbor from copyright infringement for users who, without permission of the copyright owner but in furtherance of "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," reproduce or otherwise use copyrighted materials in a fashion that represents a "fair use."

There is no talismanic test for determining fair use.

To be sure, there is no talismanic test for determining fair use. Rather, § 107 sets forth four nonexclusive factors to be considered in a determination of fair use in any given instance.[4] These factors are necessarily broad, are only of limited value in predicting outcomes in particular cases, and have, over time, been the source of countless litigations. Nevertheless, they reflect the need for a "sensitive balancing of interests"[5] in applying a doctrine that has been described as an "equitable rule of reason."[6]

§ 108 addresses at least some of the special concerns of librarians that were the subject of enormous discussion and debate prior to enactment of the legislation.[7] It authorizes certain libraries and archives, on a limited basis, to reproduce and distribute copies of copyrighted materials under standards more particularly articulated than under § 107. § 108 is nevertheless a complicated provision of law, the parameters of which are also the subject of continuing debate, accompanied by periodic calls for further legislative clarification and/or modifications. A parsing of § 108's labyrinthine provisions is beyond the scope of this paper.[8]

UNCERTAINTIES RAISED BY NEW TECHNOLOGY

The drafters of the 1976 Act made no pretense as to the law's anticipating, let alone systematically dealing with, all facets of new technology. The language is in many places deliberately broad — as in its definitions of "literary works," "copies," and "fix[ation]" in tangible forms — so as to accommodate ever-evolving means of creating, storing and reproducing works of authorship. Indeed, Congress and the Copyright Office have repeatedly expressed the hope that a number of issues raised by new technology could be resolved as the product of voluntary arrangements between creators and users. To the extent that this does not come to pass, it will obviously be left to court decisions and/or legislative reform to clarify still clouded areas of the copyright landscape.

To be sure, the unanswered questions are many. The world of software and databases, photocopy and fax machines, personal computers and optical disks inevitably invites important debate over the extent of a creator's proprietary rights and the limits of a user's right of access to particular types of materials. No wonder recent cases have grappled with issues as varied as: the degree of originality necessary to protect a database;[9] the extent to which compilations of audiovisual materials containing factual material are copyrightable;[10] the extent of protection to be afforded against the copying of nonliteral elements of computer software;[11] the extent to which corporate researchers can make individual photocopies of copyrighted materials without permission;[12] and the degree to which a commercial copyshop can fulfill an academic community's demand for anthologized course materials,[13] to mention but a few.

COPING WITH THE LAW

In the face of this continually evolving legal landscape, what is a conscientious librarian to do? There is no one set of suggestions that will suit all situations — commercial, noncommercial, academic and government. What can be offered are certain general suggestions, which to many readers will but reinforce what is, I am sure, already established practice. These should be supplemented by other steps appropriate to individual circumstances.

Stay current with evolving legal developments.

1. *Stay current with evolving legal developments.* There is a wealth of writings — in library journals and newsletters, in the legal and general literature — dealing with the law as it now stands and has been interpreted to date, as well as with as yet unresolved issues of copyright. Happily, not all of it is written by or for lawyers, and much is directed to the very issues that librarians confront in their daily work. Familiarity with at least some of these writings is appropriate.

In addition, library associations, along with local bar associations, publishers' organizations and others, frequently hold symposia discussing both more settled issues of copyright law and cutting edge topics. There are, moreover, useful publications issued by the Copyright Office — including those directed specifically to librarians — that serve as useful reference works. That such resources may not supply all the answers is not the key; being able to *identify* the issues, so as to make informed decisions concerning them, is what matters most.

Consider an "audit" of the library's copyright compliance.

2. *Use the legal resources available to you.* Many, if not most, organizations employing librarians either employ on staff, or have access to, attorneys knowledgeable about copyright matters. If such experts have not already been brought into the consultative process, it would be wise to do so. Consider an "audit" of the library's copyright compliance with the aid of such an expert. What do its various license agreements with suppliers of proprietary materials provide? How are employee requests for excerpts, or full copies, of subscription materials fulfilled? How does the library deal with document delivery services? How does it request/fulfill interlibrary loans? For what purposes is the convenience copier located in the library used? What notices appear on such copiers? Who supervises their use? These and a host of other issues can be addressed fruitfully through such a review process, which is likely to identify areas in which adjustments to practice may be appropriate.

3. *Be acquainted with the limitations placed by your suppliers of copyrighted materials on the uses to which their works can be put.* A working knowledge of the copying policies of the newsletter and journal publishers whose publications are subscribed to, as well as those of the suppliers of online information, and of document deliverers, is important. What do the publishers' masthead or copyright page statements provide? What do the online services' license agreements provide? Have document deliverers secured the necessary copyright rights to the copies of materials being conveyed to you? What evidence have they provided to assure that this is the case?

Don't be afraid to initiate a dialogue with suppliers when the extent of rights conveyances is not clear or if you believe they might be willing to offer site licenses that meet the library's photocopying needs.

4. *Explore use of collective licensing organizations, such as the Copyright Clearance Center.* In recognition of the difficult line-drawing that is involved in defining the proper parameters of fair use photocopying, among other uses of copyrighted materials, in commercial and other settings, the Congress, at the time of enactment of the 1976 Act, urged creators and users to arrive at voluntary arrangements, wherever possible, to work through these difficult legal/economic issues. One response was the establishment, in 1978, of the Copyright Clearance Center ("CCC"), a not-for-profit organization designed to act as a clearinghouse between publishers of scientific, technical, medical and other materials and institutions — whether for-profit, not-for-profit, academic, governmental or otherwise — desiring lawful and easy access to copies of portions of such materials.

Today, the CCC has grown into an organization representing more than 8,000 publishers and more than 1.5 million works. It offers a variety of licensing programs suited to the needs of corporate and other users.

To the extent the licensing opportunities offered by CCC are not already known to a given organization, it would be advisable to investigate CCC's licensing programs, since they offer a convenient solution to many of the copyright concerns that otherwise confront libraries in connection with the reproduction of copyrighted materials.

Stay current on the various collective licensing opportunities.

Other entities have begun offering authorized online and other access to copyrighted materials, although on a smaller scale than CCC. The library community should stay current on the various collective licensing opportunities that are likely to continue to present themselves in coming years.

5. *Educate employees and other users of your organization's copyright policies.* Second in importance only to developing and implementing internal policies for complying with the copyright law is the need to disseminate these policies throughout the organization and to assure that those policies are understood and followed organization-wide. This task obviously entails the cooperation of management beyond the library staff — and may not be easy or quick to achieve. Nevertheless, the importance of copyright compliance and the potential adverse consequences of failure to adhere to the law[14] are such that continuing efforts should be made to enlist full cooperation — up and down the line. Here, again, the assistance of legal counsel may be important in getting the message across and the proposed compliance program through the bureaucracy.

The best means of communicating policy will vary from situation to situation and may entail one or more written communications setting forth the policies; incorporation of the policies in employee manuals; or meetings with employees at which the policies are explained and questions can be answered. Needless to say, a policy of adherence to copyright is only as effective as its observance by all of an organization's employees.

REFERENCES

1 The genesis of copyright and patent law in Article 1, § 8 of the Constitution, which provides: "The Congress shall have Power ... to Promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

2 *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 416, 429 (1984) ("*Sony*").

3 "Literary works" are defined by the 1976 Act as comprising "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied." § 101.

4 The four factors enumerated by § 107 are:

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work."

5 *Sony*, 464 U.S. at 455 n.40.

6 H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) 65, reprinted in *1976 U.S. Code Cong. & Admin. News* 5659, 5679.

7 The 1976 Act superseded the Copyright Act of 1909 and was the product of literally decades of congressional, Copyright Office, scholarly and public study and debate — with significant input from, among others, the library community.

8 For an excellent, and readable, overview of § 108, the reader is commended to Flacks, "Living In the Gap of Ambiguity; An Attorney's Advice To Librarians on the Copyright Law," *American Libraries*, v8, May 1977. pp. 252-257.

[9] *Feist Publications, Inc.* v. *Rural Telephone Service Co., Inc., United States Reports*, no. 89-1909, March 27, 1991.

[10] *Cable News Network, Inc.* v. *Video Monitoring Services of America, Inc.*, 940 F. 2d 1471 (11th Cir. 1991) (rehearing *en banc* pending).

[11] *Computer Associates Int'l.* v. *Altai, Inc.*, 775 F. Supp. 544 (E.D.N.Y. 1991) (appeal pending).

[12] *American Geophysical Union et. al.* v. *Texaco Inc.*, 85 Civ. 3446 (S.D.N.Y. Complaint filed May 6, 1985).

[13] *Basic Books et. al.* v. *Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

[14] The 1976 Act prescribes not only injunctive remedies for infringements of copyright, but potentially severe damage assessments as well. §§ 501-505. Upon a finding of infringement, the court is empowered to award damages of between $500 and $20,000 (up to $100,000 if the violation was "willful") per infringing work. § 504. The successful plaintiff may also be entitled to recover its costs and attorneys' fees. § 505.

R. Bruce Rich, *a partner since 1981 in the New York City law firm of Weil, Gotshal & Manages, is a Phi Beta Kappa graduate of Dartmouth College and received his law degree,* cum laude, *from the University of Pennsylvania Law School. Mr. Rich engages in a broad intellectual property practice, representing creators and users involved in the publishing, broadcast and cable television fields. He actively litigates as well as counsels copyright, First Amendment and other intellectual property issues, and frequently lectures and writes in the field.*

SECTION 108: EXPANDING THE LIBRARIAN'S TRADITIONAL ROLE

By Marilyn J. Kretsinger

Traditionally, librarians have provided information to patrons free of charge and without the necessity of imposing a number of restrictions on use of library material. Today's librarian must be able to balance the copyright proprietor's right to control dissemination, including reproduction and distribution of a copyrighted work, and the user's need to have immediate access to a work. This balance becomes more difficult as new technologies make it easier to copy and distribute works.

Thanks to technology, librarians can access and retrieve material from all over the world; we have national and regional databases, coordinated collection development, telefax and satellite delivery services. It is possible to store and transmit materials electronically. But while this new technology may solve major storage problems and make it easier to share information, it also creates problems for the copyright proprietor.

At one time, the relationship between publishers and librarians was based on an understanding known as the "Gentleman's Agreement." The Agreement allowed libraries to make limited copies for users by virtue of their ownership of the physical materials. It was replaced by §108, a complex provision resulting from prolonged negotiations between the interested parties, which attempted to establish a balance between the rights of creators and the needs of users.

LIBRARIANS' RESPONSIBILITIES

§108 permits librarians in libraries or archives that meet the conditions set out therein to make or distribute no more than one copy of a work.

Librarians are required to include a notice of copyright on materials reproduced or distributed under §108. They are not allowed to make such copies or distributions for indirect or direct commercial advantage, and they are directed not to engage in any systematic copying, or reproduction of single or multiple copies of phonorecords.

A significant questions was whether or not §108 covered libraries in for-profit institutions. This requires an interpretation of the meaning of "indirect commercial advantage," as used in §108(a)(1). Congress indicated that as long as the library or archives meets the criteria in §108(a) and the other requirements of the section, including the prohibitions against multiple and systematic copying in subsection (g), the isolated, spontaneous making of single photocopies by a library or archives in a for-profit organization without any commercial motivation, or participation by such a library or archives in interlibrary arrangements, would come within the scope of §108.

PHOTOCOPYING REPORTS

§108(i) directed the Copyright Office at five-year intervals to prepare a report for Congress setting forth the extent to which this section has "achieved the intended statutory balancing of the rights of creators, and the needs of users."

The Copyright Office submitted its first photocopying report in 1983. In that report the Office concluded that §108 provided a workable structural framework for achieving balance and that on the whole the provision was working, but that there was still some confusion about (1) what constituted systematic copying; (2) the exact relationship between §107 — the fair use provision — and §108 library photocopying; and (3) some areas of noncompliance. The report made some specific recommendations for clarifying the law and encouraging compliance. It urged all parties to participate in existing collective arrangements such as the Copyright Clearance Center (CCC) organized in 1977 and to develop new collective arrangements. It also recommended adoption of a provision that would give the proprietor a single remedy for the copying of scientific, technical and medical journals or business periodicals, based on a reasonable copying fee unless the work is entered in the CCC.

The second photocopying report, issued in January 1988, contained a brief section on technology. This section discusses improvements in reprographic service capability and the demand for electronic delivery of documents and how this affects the rights of copyright proprietors. The conclusion was basically the same one reached in 1983: §108 contains the framework for achieving balance but there are still some problems with compliance. Although library groups made several recommendations for amending or implementing §108, the Copyright Office supported only one. It agreed with nine of the organizations that commented on library photo-

The views expressed are those of the author and do not necessarily reflect those of the Copyright Office.

copying, stating that the next report needed to explore more fully the effect of new technology. The Copyright Office recommended that Congress expand the scope of the report to include an in-depth study of the effects of new technology on copyright proprietors and §108 balance.

A number of guidelines have been negotiated between the parties covering use under §108 and §107. They include the National Commission on New Technological Uses of Copyrighted Works (CONTU) guidelines covering interlibrary loan, the classroom guidelines permitting individual teachers to copy materials in limited situations, and the off-air taping guidelines covering permissible taping of television broadcasts for use in a classroom. Congress contemplated that the parties would come to other arrangements as necessary. This has not happened.

UNRESOLVED ISSUES

Despite the two Copyright Office photocopying reports, and studies done by other agencies and other countries, there are a number of unresolved issues. Congress has not made any amendments to the copyright law, the CCC has not become universally accepted, and no new guidelines have been agreed upon. For example, the parties have failed to agree on guidelines that would cover nonprint materials, a library's use of computer programs, or video tapes.

Librarians have no concrete guidelines for nonprint materials specially excluded in §108(h). Subsection (h) provides that the rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than "an audiovisual work dealing with news." The latter term is intended as the equivalent in meaning of the phrase "audiovisual news program" in §108(f)(3). The exclusions under subsection (h) do not apply to archival reproduction under subsection (b), to replacement of damaged or lost copies or phonorecords under subsection (c), or to "pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e)."

Although subsection (h) generally removes musical, graphic and audiovisual works from the specific exemptions of §108, the doctrine of fair use under §107 remains fully applicable to the photocopying or other reproduction of such works. In the case of music, for example, it would be fair use for a scholar doing musicological research to have a library supply a copy of a portion of a score or to reproduce portions of a phonorecord of a work. Nothing in §108 impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproduction of copyrighted material, where the use represents legitimate scholarly or research purposes.

NEED FOR ADDITIONAL GUIDELINES

The librarian's role is undoubtedly complicated by new technologies that permit faster and greater access to materials all over the world. Publishers of electronic material and print material being stored and then networked electronically fear that librarians will be publishing their copyrighted materials without permission or payment. It is clear that in many ways §108 is already obsolete and that librarians and publishers need to agree on guidelines for an electronic age.

Marilyn J. Kretsinger *is Assistant General Counsel in the U.S. Copyright Office. Prior to becoming Assistant General Counsel, Ms. Kretsinger was a Policy Planning Advisor for the Register of Copyrights and before that an attorney on the General Counsel's staff. She worked on both the first and second photocopying reports and is coauthor of "Copyright Law and the Fair Use of Visual Images" in* Fair Use and Free Inquiry, *edited by John Shelton Lawrence and Bernard Timberg (2nd Ed. 1989).*

NEWS FROM THE COURTS

By Joanne D.S. Armstrong

Speculation about the impact of such new technologies as photocopiers, fax machines, CD-ROMs on the law of copyright has been lively and intense in the library community. Yet the most significant court activity in the copyright area over the past several years has focussed on a problem that depends on nothing more complicated than a pencil and a pile of note cards. That problem, the issue of what constitutes permissible use of unpublished materials, has been taken up recently by the United States Supreme Court, the United States Congress, and, most recently, by the Federal Circuit Court of Appeals for the Second Circuit, centered here in New York State. Despite years of discussion in all these fora, the issue is still unresolved.

This article offers a brief review of recent copyright cases involving issues of information access and use that may be of interest to librarians. Some of these cases will clearly affect today's libraries and the uses to which their readers put them. Others will more likely be relevant to the libraries of the future.

Depositories of unpublished materials may become embroiled in conflicts.

FAIR USE OF UNPUBLISHED MATERIALS

The problems of fair use of unpublished materials concern librarians for several reasons. First, libraries that function as depositories of unpublished materials may become embroiled in conflicts between authors who create the unpublished materials and authors who wish to make use of them. For example, in the *Salinger* case described below, the unpublished materials of author J.D. Salinger that were the subject of the dispute were in the collections of academic research libraries. One issue Salinger raised in his complaint (but the court did not reach in its decision) was whether the biographer who made the allegedly infringing use of the letters had, by his use, broken the agreements contained in the forms he had signed at the libraries in order to gain access to the materials; Salinger argued that as a third-party beneficiary of those agreements he was entitled to damages for breach of contract.

Such conflicts pose an alarming prospect for libraries. The more freely a collection may be used, the more attractive that collection is likely to be for a broad spectrum of users. Yet, if authors fear the unauthorized publication of their works, they may become increasingly unwilling, as one witness at a recent Congressional hearing testified, to deposit their papers in or permit the sale of their papers to libraries.

Secondly, all libraries would stand to lose if their collections were stripped of new, compelling works of criticism, analysis, and biography because the producers of such works were prevented from quoting anything from unpublished materials.

§107 of the Copyright Act of 1976[1] provides that copying and other rights to copyrighted materials are not violated if the activity in question is found to be "fair use" of the material. The statute gives as possible examples of "fair use" those activities whose purpose is criticism, comment, news reporting, teaching, scholarship, or research. The statute also includes four examples of criteria to be used in deciding whether any such activity constitutes fair use or not: purpose of the activity; nature of the copyrighted work; amount and substantiality of the copyrighted work used; and effect of the activity on the potential market for or value of the copyrighted work. The language of the statute restricts neither the appropriate purposes of fair use activities nor the criteria for finding fair use to those listed.

The open-ended language of §107 gives the courts wide latitude in how to go about determining whether a given use of copyrighted material is fair use or infringement. The process of fair use determination had, therefore, traditionally remained a flexible tool of the courts, as it was before the enactment of the Copyright Act of 1976 with its codified fair use provision. The flurry of activity in recent years involves what some have seen as a radical restriction of the courts' ability to determine that a particular use of unpublished material was a fair use.

The current controversy originated with a 1985 Supreme Court case, *Harper and Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539, 225 USPQ 1073, in which the Court found *The Nation* to have infringed Harper and Row's copyright by publishing excerpts from Gerald Ford's as yet unpublished memoirs. After a

lengthy and historical analysis of fair use doctrine, the Court concluded that "(u)nder ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."[2] This factor, the unpublished nature of Ford's work, was nonetheless only one of several considered by the court in finding *The Nation*'s use to be an infringement.

The Court of Appeals for the Second Circuit launched a bombshell in *Salinger v. Hamilton*, 811 F. 2d 90, 1 USPQ2d 1673 (CA 2 1987). In *Salinger*, the unpublished materials were letters written by J.D. Salinger that had, unbeknownst to him until the infringing work appeared in galleys, made their way into the collections of academic research libraries. Purporting to follow the path laid down in *Harper and Row*, which case was characterized by the Second Circuit as the Supreme Court's "first delineation of the scope of fair use as applied to unpublished works,"[3] the court proclaimed that unpublished works "normally enjoy complete protection against copying."[4] Despite this seemingly conclusory language, the opinion actually does go through an analysis of all four fair-use factors. Yet the *Salinger* opinion aroused widespread reaction in the copyright community centered on this language about "complete protection" for unpublished works.

In *New Era Publications Int'l v. Henry Holt and Co.*, 873 F. 2d 576, 10 USPQ2d 1561 (CA2 1989) the Second Circuit again confronted an infringement action involving use of unpublished materials. The majority opinion disagreed on the issue of fair use with the same trial judge whom the Second Circuit had overruled in *Salinger* and went into a lengthy discussion of the restriction on fair use of unpublished materials, even though that was not related to the grounds on which the result was eventually reached. The Chief Judge, James L. Oakes, concurring with the majority opinion's result but disagreeing with its argument concerning fair use, regretted that even though it was in the nature of an aside, the majority's argument tended to "cast in concrete *Salinger v. Random House*... [I]f the work is unpublished the majority considers under the second fair use test — the nature of the unpublished work — that protection follows as a matter of course....I disagree."[5] Many in the publishing industry, as well as many copyright commentators and others in the copyright community agreed with Oakes that the Second Circuit had effectively fashioned a *per se* rule with respect to unpublished material, i.e., that if the material allegedly infringed against was unpublished material, then *as such* the use complained of could not be fair use.

Some Second Circuit judges felt strongly enough that the unnecessary remarks in *New Era* would create panic in the publishing and academic worlds that they undertook an effort to have the language of the decision clarified by all the judges together *en banc*.[6] That effort was rebuffed by a majority of the Second Circuit judges, but the dissension amongst their ranks was made clear to the public in the opinion and dissent issued in connection with the denial of a rehearing *en banc*.

Partly in response to the Second Circuit decisions in *Salinger* and *New Era*, bills were introduced in both Houses of the 101st Congress to bar any distinction between published and unpublished works with respect to the availability of a fair use defense.[7] Both these bills died in Congress, apparently as a result of computer industry concerns about the protection of unpublished source codes for software.

The more freely a collection may be used, the more attractive that collection is likely to be for a broad spectrum of users.

After the introduction of the bills in the 101st Congress, the Federal Court for the Southern District of New York issued opinions in two cases concerning fair use of unpublished materials. On September 19, 1990, the court decided *Wright v. Warner Books*, 748 F. Supp. 105, 16 USPQ2d 1356 (SDNY 1990). In *Wright*, the court accepted a fair use defense of the use of unpublished letters by a literary biographer. A subsequent opinion issued April 9, 1991, *Arica Institute, Inc. v. Palmer*, 761 F.Supp. 1056, 18 USPQ2d 2013 (SDNY 1991) also allowed the defense of fair use of unpublished materials for a critical and scholarly work.

In the 102d Congress, bills were again introduced to extend the possibility of a fair use defense to uses of unpublished materials, this time taking into account the concerns of the computer industry. Senator Paul Simon introduced S 1035 on May 9, 1991, with the aim of reasserting the total fair use analysis employed by the Supreme Court in *Harper and Row* for unpublished works. Simon's legislation aimed to dismantle the apprehensions of a virtual *per se* rule created by the Second Circuit's decisions in *Salinger* and *New Era*, as he noted in his introductory remarks:

> "These decisions have created something of an uproar in the academic and publishing communities. The specter of historical and literary figures and their heirs exercising an effective censorship power over unflattering portrayals has already had a chilling effect. Books that quote letters, even those written directly to the authors, have been changed to omit those quota-

tions. Other lawsuits have been filed against biographers. If scholars and historians can be prohibited from citing primary sources, their work would be severely impaired... [I]f this trend continues, it could cripple the ability of society at large to learn from history and thereby to avoid repeating its mistakes."[8]

Rep. William J. Hughes introduced Bill HR 2372 on May 16, 1991, which included the same provision about fair use analysis for unpublished works as did S 1035. Hughes remarked, in connection with his bill:

"Biographers, historians, literary critics, and other writers and creative artists frequently quote from unpublished letters and other unpublished works. Under the multiple factor analysis called for under the fair use doctrine, this has been permitted. However, writers are now being told by their lawyers that they can no longer do so without the approval of the author of the work in question.

"These decisions seem to have strayed from the balancing of interests approach embodied in the fair use doctrine. They suggest that there is an absolute and unlimited property right in the owner of an unpublished work, and that all other fair use considerations are meaningless. This is not consistent with the purpose and direction of American intellectual property law, nor with the lengthy jurisprudence that shaped the fair use principles codified in §107 of the Copyright Act."[9]

Copyright law is not intended by the Constitution to protect privacy, but to encourage creativity.

Hearings on the Hughes bill began on May 30, 1991. Witnesses on behalf of the proposed legislation spoke of the need for legislative action to remove the chilling effect of the Second Circuit opinions on fair use interests of scholarship, criticism, teaching and news reporting. Under *Salinger*, it was alleged, historians, biographers and journalists must choose either not to use any quotations or to limit them in such a way as to fail to convey any flavor of them. Even if the Second Circuit upheld the Southern District of New York in the appeal of *Wright*, it was contended, the chilling effect could continue, since *Wright* (in which the unpublished material had been letters written to the biographer herself and constituted a minimal amount of material) could be viewed as a specially strong case for fair use. Responding to questions about whether the legislation would not interfere with the author's intentions that certain writings not be made public, witnesses pointed out that criminal statutes and state privacy and tort laws could be invoked where appropriate. Copyright law, it was added, is not intended by the Constitution to protect privacy, but to encourage creativity.

An overbroad fair use doctrine could discourage donation of unpublished works.

In June, other witnesses spoke against such a legislative corrective. Scott Turow, the novelist, testified that the controversy over fair use is a struggle between authors of primary and authors of secondary works, in which the latter are seeking to profit from the labors of the former. Turow urged that Congress make very clear its intent not to broaden but merely to maintain the fair use doctrine, since according to him an overbroad fair use doctrine could discourage donation of unpublished works to libraries and even lead authors to destroy them in order to avoid unauthorized exploitation by others. Other witnesses emphasized the prematurity of legislative involvement, since the courts might be seen as working out the problem for themselves, especially in the opinions written at the denial of a rehearing in *New Era*. If Congress stepped in unnecessarily, it was feared, the flexibility of the judge-made doctrine of fair use would be constrained by a potentially unlimited number of statutory restrictions and special rules.

Hearings on the House bill concluded on June 20, 1991. In the meantime, the Senate Judiciary Committee had reported S 1035 to the full Senate without amendment on June 13, 1991. The bill passed the Senate on a voice vote on September 27, 1991, and was referred to the House of Representatives.

A few days later, the House dropped its own, identical, fair use provision from HR 2372. On October 1, 1991, at the Subcommittee on Intellectual Property and Judicial Administration markup of HR 2372, the bill's author, Rep. Hughes, offered an amendment that dropped the fair use provision on the grounds that the SDNY opinion in *Wright* clarified that fair use privileges may indeed extend to unpublished writings. The bill, without the fair use provision, was then approved by the subcommittee on a voice vote.

Finally, on November 21, 1991, the Second Circuit

affirmed the Southern District's decision in *Wright v. Warner Books, Inc.*, 953 F.2d 731. In affirming the trial court's dismissal of infringement claims, the appeals court observed that fair use remains a question for examination in totality. However, since the opinion specified that only minimal use was made of the copyrighted material, fears that the affirmation of *Wright* might be narrowly construed in future cases have not been dispelled.

As this article goes to press, the Senate bill on fair use of unpublished materials, S.1035, is still pending in the House Judiciary Committee, Subcommittee on Intellectual Property and Judicial Administration. In the absence of legislative action, it remains to be seen whether the *per se* rule of *Salinger* and *New Era* still holds sway or whether *Wright* has restored the total fair use analysis of *Harper and Row*.

DEPOSIT OF UNPUBLISHED WORK IN LIBRARIES

Under the pre-1978 copyright law, unpublished works were automatically protected from the time of their creation by the limited protection of common law copyright, also known as the right of first publication. Once a work was published, common law protection terminated and, if notice of copyright was not furnished in accordance with the statute, then the work would fall into the public domain. Although under the Copyright Act of 1976 the old distinction between published and unpublished works was eliminated, the distinction can still be important in determining whether works created before the 1976 Act are protected or not.

Facts (like ideas) are not themselves subject to copyright protection.

On October 29, 1990, the Federal District Court for the Southern District of New York held, in *Kramer v. Newman*, 749 F. Supp 542, that the mere presence of unpublished works in an academic library would not function legally as publication (citing the Southern District decision in *Wright* and the Second Circuit decision in *Salinger*), and therefore would not terminate the common law copyright of the works. The court noted with interest a position taken by the New York State Court of Appeals in 1889, when, in an aside within the opinion in *Jewelers' Mercantile Agency, Ltd., v. Jewelers' Weekly Pub. Co.*, 155 N.Y. 241, the State's highest court said that "to give [a work] to the public libraries where all the public may have access to it is to publish it".[10] The *Kramer* court drew the distinction between the general access afforded by public libraries and the restriction of readership to a limited class of researchers in an academic library.

COMPILATIONS AND THE ORIGINALITY REQUIREMENT: THE "WHITE PAGES"

Either as authors and users of reference materials or as consultants to the same, librarians should be aware of a landmark decision of the Supreme Court on the degree of originality required to support a claim of copyright in a work. In *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 111 S. Ct. 1282 (1991), the Supreme Court held that the compilation of the white pages of a telephone directory failed to satisfy the minimal degree of creativity necessary to enable the creator to copyright the work. The case revolved around two cardinal principles of copyright law. First, facts (like ideas) are not themselves subject to copyright protection. Only a particular expression of those facts, separable from the facts themselves, may be protected. Second, compilations of facts may unquestionably be protectable. In order for a compilation of uncopyrightable facts to be eligible for protection, the compilation must contain originality in the selection and arrangement of the facts. The selection and arrangement of a factual compilation constitute the "expression" in which copyright can be claimed.

Only a particular expression of those facts, separable from the facts themselves, may be protected.

In its analysis of the language of the Copyright Act of 1976 concerning the definition of "compilation", the Court rejected the "sweat of the brow" doctrine that had arisen over the years preceding the Act through a multitude of lower court decisions. Under this now-defunct doctrine, lower courts had found collections of facts to merit copyright protection on the basis of the labor that had gone into their collection, irrespective of any originality in selection or arrangement of the resultant work. In *Feist*, the Court held that in order to be a copyrightable compilation, a collection of uncopyrightable facts had to display some minimal degree of creativity in its selection and arrangement, which the allegedly infringed telephone directory did not possess.

It should be noted that the work that was found to lack even the minuscule amount of creativity required was a

standard white pages telephone directory, containing in alphabetical order the name, town of residence, and telephone number for each telephone service subscriber. Subsequent cases from lower courts have held various other factual compilations, including yellow pages directories (classified directories of business subscribers to a telephone service), to have met the standard of creativity required for copyright eligibility.[11]

MULTIPLE PHOTOCOPYING OF COPYRIGHTED MATERIAL

On March 28, 1991, the Federal District Court for the Southern District of New York issued its opinion in *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522. The court held, among other things, that photocopying excerpts of copyrighted works, assembling them into course packets, and selling them to students at a profit, all without permission from or payment of fees to the copyright owner, was not fair use of the copyrighted material.

The court refused to hold that unauthorized anthologizing of copyrighted materials was *per se* infringing, but rather went through a traditional analysis of the four fair-use factors and found infringement, reasoning as follows: (1) the nature of the use was commercial (Kinko's intended to make profit), which favored the plaintiff; (2) the nature of the copyrighted work was factual or at least nonfiction, which favored the defendant; (3) the amount and substantiality of the copyrighted work used were significant, which favored the plaintiff; and (4) Kinko's product was likely to affect the markets for or value of the copyrighted work to a considerable extent, inasmuch as it both obviated the need for students to purchase full texts and deprived copyright owners of permission fees to which they are entitled, which favored the plaintiff. The court pointed out in connection with the third of these factors that Kinko's frequently copied whole chapters out of books, from which the court inferred that the copied material was not supplementary to the course assignments, but stood alone and expressed complete ideas, and therefore comprised the assignments themselves. Moreover, with respect to materials copied from out-of-print books, the court noted that permission fees for copying may represent the only source of income remaining from these books for the copyright owner.

Kinko's practices were also found to be in violation of the "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions," which were negotiated and agreed to by the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, the Authors League of America, and the Association of American Publishers during the deliberations preceding the passage of the Copyright Act of 1976. The copying failed to meet the spontaneity requirement of the Guidelines, since copying was done at the beginning of the semester for the whole term. Nor did Kinko's put notices of copyright on the copied material, another violation of the Guidelines.

The court entered final judgment for the plaintiff publishers on October 17, 1991, and on the same day the Association of American Publishers announced a $1.8 million settlement agreement that had been reached between the parties in order to bring the litigation to a close without further appeal. At the same time, the AAP announced a long-range program aimed at improving the system whereby permissions to copy are processed.

The socially useful objectives of library copying win it greater latitude.

Libraries are not necessarily directly affected by this cracking down on photocopying. The court in *Basic Books v. Kinko's* stated that the commercial copying in that case can be contrasted to library copying, citing the old *Williams & Wilkins* case, 487 F. 2d 1345, 203 Ct. Cl 74, *aff'd*, 420 US 376 (1975) as an example of fair use photocopying by libraries (where the libraries established rules regarding page limitations, frequency and number of copies, and did not charge a copying fee). The court also cited the prominent commentary *Nimmer on Copyright* to the effect that the socially useful objectives of library copying win it greater latitude than is extended to the profit-motivated copyshops. But the copyshops continue to be a testing ground for the fair use statute: this spring the Association of American Publishers has filed a suit in Federal court in Detroit against Michigan Document Services, a copying business that prepares and sells course anthologies without obtaining permission from the copyright owners, claiming to legitimize this by collecting an arbitrary royalty of one cent a page from customers for ultimate payment over to the publishers.

Another noteworthy multiple photocopying case ended in October 1991, when the parties in *Washington Business Information Inc. v. Collier, Shannon & Scott* reached a pretrial settlement. The case had been brought by the publisher of a newsletter entitled "Product Safety Letter" against a law firm that had allegedly infringed the publisher's copyright by making multiple copies of the entire newsletter for distribution to its employees. The settlement called for the law firm to cease its photocopying of the newsletter and to make a cash payment to the publisher. It also called for the parties to urge the development within their respective pro-

fessional and trade associations of official policies on photocopying practices.

TAPING OF BROADCAST MATERIAL

On October 3, 1991, Senator Orrin Hatch remarked on the floor of Congress that "[b]roadcast monitoring is absolutely invaluable to...libraries."[12] Probably few libraries today maintain files of taped news broadcasts. Yet the number of libraries with clippings of television news is likely to grow in the future as patron demand for this heretofore largely ephemeral, yet increasingly influential, material grows.

Senator Hatch made his remark in the course of introducing Bill S.1805, intended to clarify that news monitoring services are a fair use of copyrighted material under §107 of the Copyright Act. Supporters of such legislation are responding to several recent cases in which the activities of broadcast monitoring services were found to be infringements rather than fair use. On May 29, 1991, the Federal District Court for the Northern District of Georgia found a broadcast news clipping service to have willfully infringed by copying and selling edited excerpts of broadcast news programs in *Georgia Television Co. v. TV News Clips of Atlanta*, 19 USPQ2d 1372. The same defendant had been involved in similar litigation as much as eight years previously and had been held to have infringed by the Eleventh Circuit Court of Appeals.

On September 4, 1991, the Eleventh Circuit sent out a more sympathetic signal to news broadcast monitors by refusing to sustain a blanket injunction of the District Court preventing a monitoring service from taping and selling any part of present or future CNN broadcasts in *Cable News Network Inc. v. Video Monitoring Services of America Inc.*, 940 F. 2d 1471. The court reasoned that protection of as-yet uncreated works was outside the scope of the copyright law, and that without more specific identification, it was not consistent with the fair use provisions of the Copyright Act to deny the use of the broadcast generally.

This slight thaw notwithstanding, Senator Hatch introduced his bill in October. A few months later, the Eleventh Circuit announced that the entire court would rehear the *CNN* case *en banc*, and that the initial panel decision of September 4 was vacated. At present, the Hatch bill is pending in the Judiciary Committee: no hearings are currently scheduled.

A video display system to be installed in hotels involved infringing public performance of copyrighted movies.

PUBLIC PERFORMANCE

Finally, this roundup moves from the notecards with which it began, and the well-established technology of high-speed photocopying, to the latest in video display technology. On November 14, 1991, a Federal trial court, in *On Command Video Corporation v. Columbia Pictures Industries*, 777 F. Supp. 787 (N.D. Cal. 1991), held that a video display system to be installed in hotels involved infringing public performance of copyrighted movies. Libraries will be interested to note the court's analysis of an in-house display system as transmission for the purpose of public performance. Public performance is one of the rights reserved by the Copyright Act to the copyright owner; §101 of the Act defines "public performance" as either performance at a place open to the public, or transmission of a work to such a place or simply "to the public," even if the members of the public capable of receiving the work do so at different times or places.

The video display system involved in this case consisted of television receivers in the individual hotel rooms, a bank of separate video cassette players and a switching device in a centralized location elsewhere in the hotel, and wiring connecting the bank of cassette players to the hotel rooms. By means of this system, a guest could select a movie from a menu appearing on the television screen in the individual's hotel room, thereby activating the switch in the central location to select the

Abbreviations used in the text are as follows:

U.S. = *United States Reports*
F.2d = *Federal Reporter, Second Series*
F.Supp. = *Federal Supplement*
N.Y. = *New York Reports*
Cir. = Circuit
D. = District
SDNY = Federal District Court for the Southern District of New York

player loaded with the chosen movie and transmit that movie to the guest's room.

The court held that the system's transmission of the videos from one location to another brought the display within the last type of public performance defined in §101. Even though the hotel rooms were not public places (following an earlier decision of the Ninth Circuit Court of Appeals in *Columbia Pictures v. Professional Real Estate*, 866 F.2d 278 (9th Cir., 1989), the guests within those rooms were members of the public by virtue of their commercial relationship with the transmitter of the video. Therefore, transmission through wiring from one part of the hotel to another to reach members of the public who would view the videos at different times and in different nonpublic places was held to be a public performance of the copyrighted movies.

AFTERWORD

Despite the wide range of topics covered by the cases described above, the issue of fair use of copyrighted materials emerges as the major focus of debate. In each of the fair use cases, the courts have grappled with the meaning and applications of §107, the general fair use provision of the Copyright Act of 1976. In closing, it should be noted that the special fair use provision applicable to library copying, §108, has been largely uncontroversial of late (at least from the point of view of the courts). Indeed, the balancing of information producers' and users' interests embodied in §108 has been deemed so successful that, in the first session of the current Congress, both the House and Senate passed bills eliminating the requirement under §108(i) that the Register of Copyrights report regularly to Congress on whether that balance is being achieved. In the words of Representative Hughes: "Congress has now had more than 12 years of experience under the library reproduction statute, and it is clear that Congress struck a fair balance between public and proprietary interests."[13] Maybe someday the same might be said of §107!

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1 Title 17, United States Code.

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3 811 F.2d 90 at 95.

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5 873 F.2d 576 at 585, 587.

6 884 F.2d 659.

7 Bills HR 4263 and S 2370 introduced on March 14, 1990, and March 29, 1990, respectively.

8 *Congressional Record*, May 9, 1991. p. S5648.

9 *Ibid.*, May 16, 1991, p. E1821.

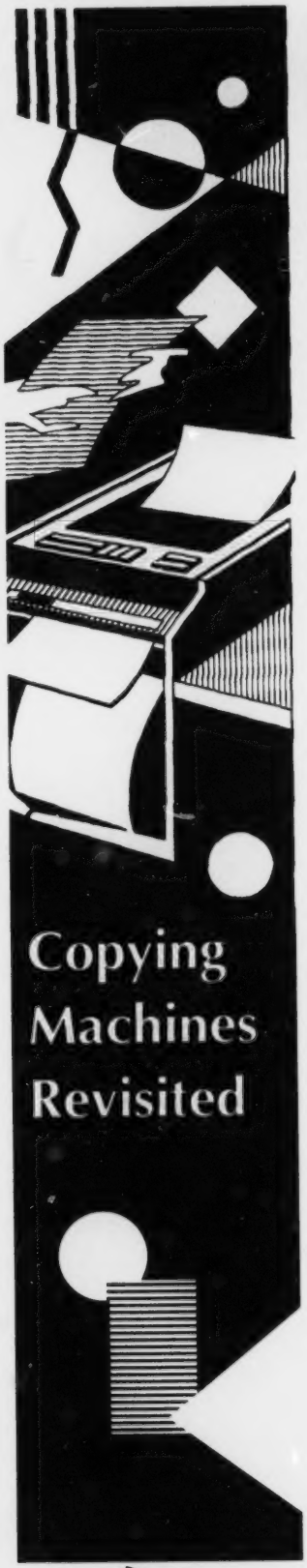
10 49 N.E.2d 872 at 875, cited in 749 F. Supp. 542 at 549.

11 *Bellsouth Advertising & Publishing Corp. v. Donnelly Information Publishing Inc.*, 933 F.2d 952 (11th Cir. 1991); *Key Publications Inc. v. Galore Enterprises Inc.*, 945 F.2d 509 (2d Cir. 1991).

12 *Congressional Record*, October 3, 1991. p. S14352.

13 *Ibid.*, November 18, 1991. p. H10288.

Joanne D.S. Armstrong *is Acting Head of Public Services at Columbia University Law School Library and a member of the New York Bar. Before joining Columbia, she was an associate at the New York City law firm of Haight, Gardner, Poor and Havens. A former ballet dancer, she has done extensive research in choreographic copyright and the work-for-hire doctrine.*



1

COLLECTIVE LICENSING AS A PRACTICAL SOLUTION

By Joseph S. Alen

Most thoughtful persons recognize and acknowledge the role of copyright laws in fostering creativity and promoting the "progress of science and useful arts, by securing for limited times to authors...the exclusive right to their respective writings...."[1] However, without effective implementation mechanisms, the laws can be subverted and the rights lost.

Collective administration of copyrights is one of the most valuable implementation mechanisms. Collective licensing by performance rights organizations such as the American Society of Composers, Authors and Publishers and Broadcast Music, Inc. established decades ago was responsible in large measure for the great commercial value of the public performance right in copyright.

More recently, in the 1976 revision of the copyright law, the U.S. Congress suggested that the particularly affected interest groups work together to develop a practical clearance and licensing mechanism for the reproduction right in copyright.[2]

In response to this suggestion, the not-for-profit Copyright Clearance Center (CCC) was created by the combined initiative of rightsholders and users to act as a photocopy licensing clearinghouse for the United States. Through the years since its founding, CCC has demonstrated its ability to respond adaptively to the requirements of both rightsholders and users by refining, revising, streamlining and augmenting its original programs and services.

In its earliest stages, accommodation of competing needs of the various interest groups (authors, publishers, special librarians, document suppliers and research users) led to the creation of a transactional reporting/payment system known as the Transactional Reporting Service (TRS). Initially conceived to be particularly responsive to scientific, technical and medical journals, the program was (and is) a pay-as-you-go, copy-by-copy reporting system whereby users report actual copies, and CCC issues monthly invoices according to publisher-set fees. Because such a system identifies amounts of photocopying on a title-by-title basis, accounting for and distribution of royalties to publishers are essentially mechanical processes.

Although this system continues to work effectively for specific types of users and specific types of copying, it became apparent by 1983 that a solely transaction-based system could not meet the needs of large portions of both the user and rightsholders communities. Consequently, the Annual Authorizations Service (AAS) was created.

A type of "blanket licensing," the AAS authorizes for-profit users to make unlimited copies of articles and chapters (i.e., only portions of works) from CCC-registered titles for internal use. The license fee (paid annually) is calculated for each corporate user on the basis of (a) survey data, which provide concrete information about the type of copying occurring within the particular company or industry, and (b) user-supplied information about the licensee's number and type of employees. Distribution of royalties collected under the AAS is determined by the incidence of particular titles in the survey data. Per-title fees, set individually by publishers, are used in the calculation of both the license price and the annual distribution to rightsholders.

The establishment of the AAS was a significant step in CCC's development, as it met the needs of large, for-profit corporate users by maximizing simple, lawful access to copyrighted materials while minimizing administrative record keeping and payment systems.

A third major feature of CCC's current programs and services developed from the demand generated by the growing recognition of the global nature of the flow of information. Users need and want timely access to works produced throughout the world. Authors and publishers expect fair compensation for reproduction of their works, no matter where that reproduction or photocopying takes place.

The challenges and complexities created by the effort to coordinate the needs of the many and various interested parties, within the framework of the many and various national laws, were enormous. In this international context, the establishment of national Reproduction Rights Organizations (RROs) has been of tremendous importance and benefit.[3]

In general, RROs are comparatively new, with the majority having come into existence in the last 15 years. In many countries, they are created by national legislation or regulations. Also, in many countries RROs operate under various forms of statutory licensing systems. RROs have been established in 19 countries in Europe, North America, Africa and Asia. The Copyright Clearance Center, a purely voluntary system unlike its European counterparts, is the RRO for the United States.

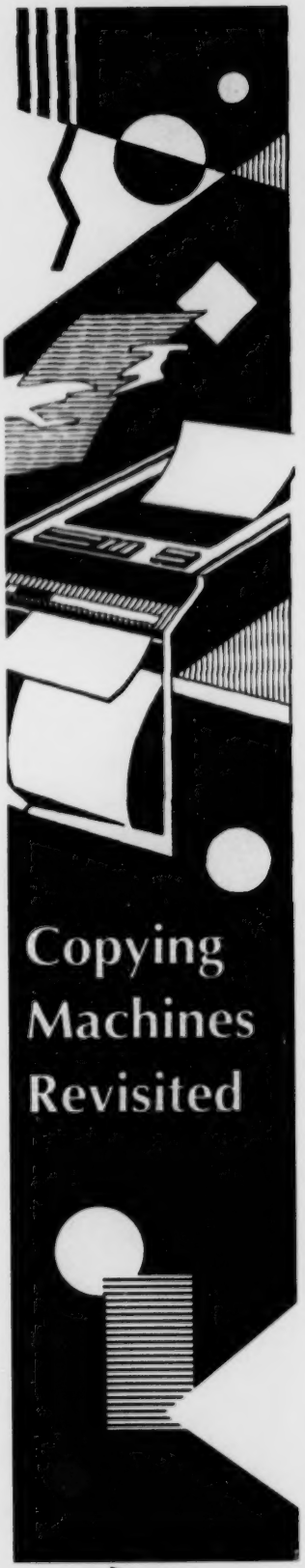
The challenge presented by the global circulation and availability of copyrighted materials is addressed when RROs enter into bilateral agreements with each other, conveying reciprocal licensing authorizations and royalties for their national repertories of works. Each of these bilateral agreements is governed by the principle of "national treatment" as articulated in the Berne Convention, the primary international convention in the area of copyright. Under the principle of national treatment, each party to the agreement agrees to treat the rightsholders represented by the other party in a manner no less favorable than the manner in which it treats domestic rightsholders. Thus, operating in accordance with their own national system, the RROs are able to license domestic users, collect the royalty fees and distribute them, through the other RRO, to foreign publishers and authors. Utilizing this structure, CCC now distributes nearly 25 percent of its collections to foreign rightsholders and has repatriated $5 million to the U.S.

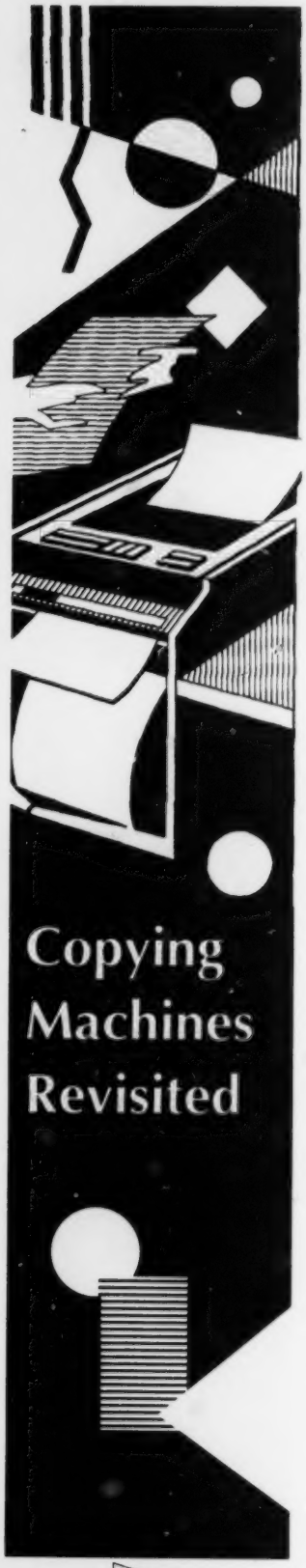
CCC's most recent program grew out of the necessity created by the decision in *Basic Books, Inc. v Kinko's Graphics Corp*, 758 F Supp. 1522 (S.D.N.Y. 1991). In this case, the court ruled that copying by for-profit copyshops to create course packs for sale and distribution at colleges and universities was *not* "fair use" under U.S. copyright law. This ruling, in spring 1991, generated enormous demand by copyshops, book stores, campus copy centers and individual professors for permissions from rightsholders for use of copyrighted materials in course packs.

The same conditions exist in the course pack market as in the corporate market. There are huge numbers of rightsholders and users confronting the need to administer (e.g., intake, track, process, invoice, follow up, etc.) millions of permissions. These conditions require a central rights/royalty clearinghouse like the CCC.

Essentially a transaction-based program, CCC's Academic Permissions Service (APS) provides course pack permissions either via a catalog containing a substantial repertory of titles from which publishers have "preapproved" copying, or on a case-by-case basis for all other titles. Although still in its early stages of development, within its first few months of operation the APS has registered over 1,000 "preauthorized" publishers representing some 25,000 titles, and processed requests for over 10,000 course packs. As the needs of both rightsholders and users in this new and complex market become more clearly defined, CCC will continue its well-established pattern of working to refine, adjust and modify the new program to accommodate best the needs of all.

CCC is also seeking to respond to new necessities created by the needs of new market sectors, the challenges of new technologies and the demand for further streamlining of current programs. For example, CCC is conducting a pilot program that provides limited electronic access to participating titles for clearly defined electronic uses. There is a strong, persistent and growing demand for lawful electronic access to copyrighted materials





as well as for a central, facilitative licensing mechanism. CCC expects to continue to play a role in the harmonization of users' and rightsholders' needs in this important area.[4]

From a simple, unformed idea — a "suggestion of Congress" — the Copyright Clearance Center has grown into a multifaceted, technologically sophisticated service organization actively engaged in the support of the principles of copyright in a national and international context. In March 1992, CCC distributed nearly $5.8 million. U.S. copyright law, as originally conceived, was designed to foster creativity in the arts and sciences. CCC is proud of the creativity it has demonstrated in responding and adapting to the challenges of technologies and to the needs of our constituencies.

REFERENCES

1 U.S. Constitution, Article I, Section 8.

2 House report no. 83 on Copyright Law Revision, 90th Congress, 1st session 33; Senate report no. 94-473 on Copyright Law Revision, 94th Congress, 1st session 70-71.

3 *See* "The International Scene" elsewhere in this issue.

4 For a copy of a recent, 70-page CCC paper entitled *Toward a Copyright Management System for Digital Libraries*, please contact the author at CCC, 27 Congress St., Salem, MA 01970.

Joseph S. Alen *is Vice President of the Copyright Clearance Center and Secretary General of the International Federation of Reproduction Rights Organisations (IFRRO). At CCC, in addition to general management, he is responsible for international relations. Mr. Alen is the author of a number of articles on collective licensing of reproduction rights and a frequent speaker at national and international gatherings of authors, publishers and users of copyrighted materials.*

2

COPYRIGHT AND PRESERVATION: AN OVERVIEW

*By Robert L. Oakley**

Discussions of preservation inevitably lead to questions about copyright. There is good reason for the linkage since the most common approach to preserving library material is to copy it. For some materials, such as rare books, librarians may choose to try to preserve the original; such items are valuable not only for their content, but also as artifacts. In most cases, however, librarians elect to preserve the content of a work by copying, rather than trying to salvage the item itself, for copying is the solution of choice for a wide range of reasons, including most prominently the magnitude of the problem, the level of deterioration and the availability of financial resources.

The Commission on Preservation and Access in Washington, DC, was created to provide an organizational structure to assist libraries addressing the preservation problem and to promote a funding plan to achieve the goals of the program. Working with the National Endowment for the Humanities and the U.S. Congress, the Commission helped to establish a goal to raise the rate of preservation microfilming to a level that would enable the nation's libraries to preserve the intellectual content of three million volumes over a 20-year period. But the Commission and the libraries with which it works hope eventually to move beyond preservation microfilming and toward a central distribution facility with documents in digital format:

> The ultimate vision is the existence of a collective knowledge base, in digitized format, from which institutions and individuals can obtain information in a variety of formats to serve the scholarly objectives and programs....This initial system would exist with the expectation that storage, access, and service enhancements would evolve with the increasing use of technology by scholars, and with the expanded availability of network capabilities to the research community.[1]

This article explores briefly the interface between these visions of preservation copying and the Copyright Act of 1976, as amended to date in Title 17 of the U.S. Code (hereafter referred to as the Act), to identify what is clearly permitted under the Act, what limitations it sets, and where there remain ambiguities forcing libraries to decide what level of risk they are willing to assume in order to pursue their goals.[2]

WHAT IS IN THE PUBLIC DOMAIN?

The threshold question is whether a particular work is protected by copyright or is in the public domain. Any work in the public domain may be copied and redistributed freely, in microform and even in digital form.

Works may be in the public domain if they did not meet the original requirements for copyright protection, if that protection subsequently expired, or if they fall into certain classes of works that are not copyrightable. Under the 1909 Copyright Act, the predecessor to the current Act, published works[3] containing a valid notice of copyright were protected at least as of the date of publication for a period of 28 years. Such works could be renewed for an additional 28 years. Year by year, the renewal period was extended until it reached 47 years, for a total period of protection of 75 years.

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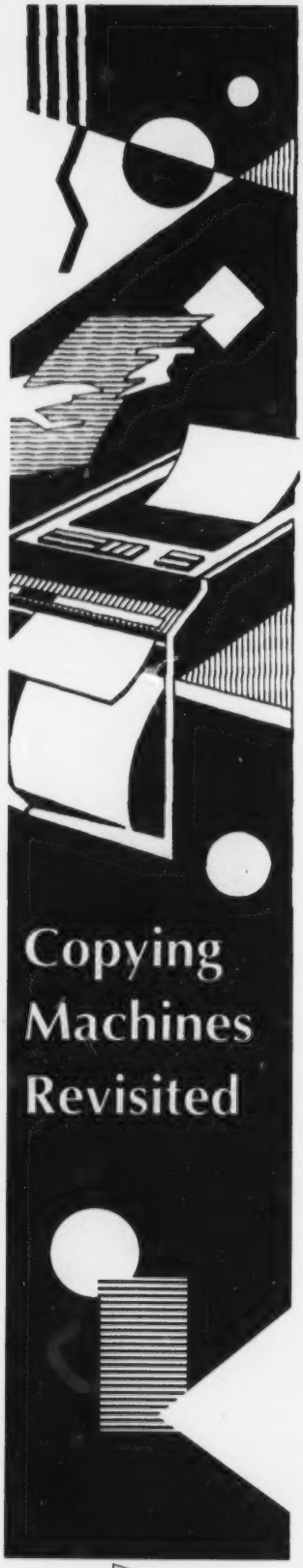


Under these principles, works that were published without the required notice went into the public domain immediately. The number of such works was relatively small, however, and it should be presumed that most published works were protected at least as of the date of publication.

After 28 years, works published under the old Act had to be renewed. According to statistics from the Copyright Office,[4] many, possibly even most, of the works whose copyright reached the end of their first term never had their copyrights renewed. Those works are, therefore, in the public domain,[5] and for that reason, there is a good chance that any work more than 28 years old is in the public domain. Works still in their first 28-year period (published since 1964 but before 1978) or after the new Act went into effect should be presumed to be protected. Works older than 75 years — published before January 1, 1917 — definitely are in the public domain.

Finally, works of the U.S. government may not be protected under copyright, and such works are in the public domain, except where they reproduce material that has been copyrighted elsewhere.

WHAT PRESERVATION COPYING IS PERMITTED?

For those works that are in the public domain, preservation copying may proceed without restriction. Multiple photocopies or microfilm copies may be made for use in one library and distributed or sold to others. The work may be copied into digital forms, as a text file or as an image file. The electronic copies may be kept centrally and distributed over electronic networks to libraries or individuals requesting copies.

The situation is much different for those works that are still protected. The Act gives certain exclusive rights to the copyright owner including the right to control the making and distribution of copies and the right to display a work publicly.[6]

§108 of the Act creates a safe haven for certain library copying of protected works, including preservation copying. This section indicates that under certain conditions, it is permissible for a library to make a single copy "in facsimile form" of a published work to replace a copy that is damaged, deteriorating, lost, or stolen if it has determined that an unused replacement cannot be obtained at a fair price.

It is important to note that this section places a number of limits on preservation copying. One of the most important is the single copy limitation that applies to all of the library exemptions contained in §108. This limitation presents a serious problem for the preservation community because currently accepted standards require the production of a minimum of three copies in most microform-based preservation projects: one archival copy to be stored, one production master, and one use copy. The preservation portion of §108 clearly did not contemplate the large-scale, well-organized programs now under way to preserve the world's literature; it really only dealt with the reproduction of a single deteriorated volume to meet the needs of a library's own clientele.

A second limitation is that the library must have made a reasonable effort to find an unused replacement at a fair price. This constraint is not unreasonable for those works that have been published relatively recently. But large-scale preservation programs — sometimes thought of as brittle books programs — are dealing, for the most part, with works that are old enough for the paper to show noticeable signs of deterioration. Another copy, even an unused one, of the same age is likely to be in a substantially similar condition. As a result, some libraries have been willing to assume that unless a work has been reprinted relatively recently they need not actually do an exhaustive search for another copy before proceeding to preserve the original.

The third serious limitation to the preservation exemption is the limitation to copying in "facsimile form." The Act was passed before telefacsimile was common, and the legislative history makes it relatively clear that this wording was intended to mean that preservation was only permitted in analog forms, such as paper or microform, but not in digital forms.[7] This restriction supports the owner's public display right, but it seri-

ously undercuts the ultimate vision of the preservation community cited above.

WHAT ABOUT FAIR USE?

Librarians may exceed the safe harbor provisions provided in §108 of the Act, but to do so they must fall back on the much more uncertain provisions of fair use in§107. Fair use is a rule of reasonableness that calls for the balancing of four factors to determine whether any given copying is "fair use" and therefore lawful: (1) the purpose of the copying; (2) the nature of the work; (3) the amount and substantiality of the portion copied; and (4) the effect of the copying on the potential market for the work.

Preservation copying, narrowly defined, is likely to be found to be fair use.

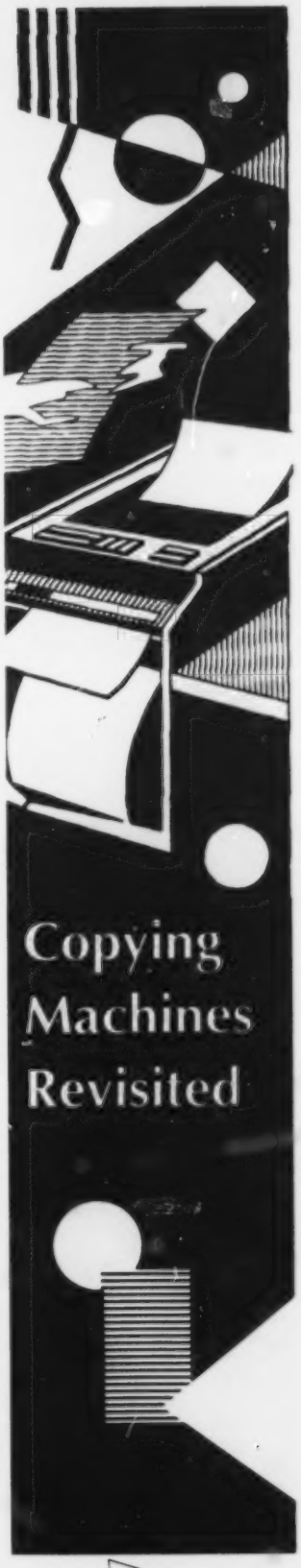
Here, the copying would undoubtedly be found to be for a good purpose provided the preservation program was narrowly defined and not being used as a mechanism to do other things, such as creating a digital database of relatively current materials for distribution over a campuswide network. In other words, preservation copying alone would probably meet the first test, but if the preservation copy was then being used for other less legitimate purposes, it would raise a serious doubt. The second criterion — the nature of the work — is designed to prevent the copying of consumable works, such as workbooks, blank form books, etc. For the most part, this will not be a factor in narrowly confined preservation copying. The third factor — the amount of a work being copied — is negative since by definition the preservation program will not only seek to copy complete works, it may well seek to make multiple copies of complete works. Finally, the fourth factor — the effect on the market — is unknown because it depends on many other things: how recently the preserved item was published; the intention of the publisher to reprint; the subsequent distribution of multiple copies of preserved material; etc.

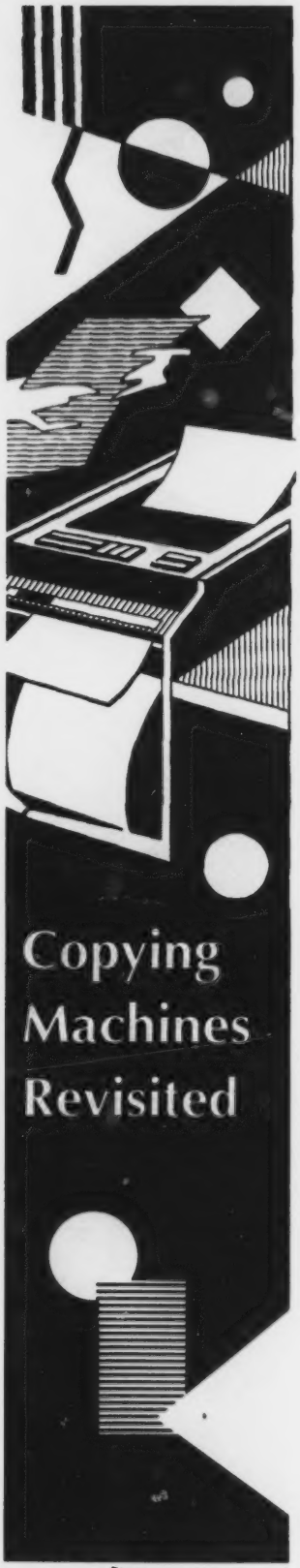
In general, the conclusion of the author is that despite the third fair use criterion, preservation copying, *narrowly defined*, is likely to be found to be fair use. Preservation of library materials is widely viewed as important. The preservation exemptions now contained in §108 were the first to be added to the Act when it was drafted and were never challenged. As a result, it seems likely that the three copies required by current preservation standards would be permitted provided they were for the preservation of an actually deteriorating work, not currently in print, and not used for widespread or general distribution in a way that would interfere with the market of the copyright owner. If, however, librarians exceed a narrow definition of preservation to make multiple copies for general distribution, to "preserve" new materials as they arrive in the library, or otherwise interfere with the market of the publisher, then there could be no fair use.

Similarly, the mere digitization of a work for preservation purposes, *narrowly defined*, would probably be found to be fair use. But if the librarian were then to make the digital image available on a campus network or over the developing national network, neither §108 nor the concept of fair use will allow the librarian to prevail. Congress was worried about just such a development when it gave the copyright owners the right to control the public display of their work.

CONCLUSION

Under the Act there is much that librarians can lawfully do to preserve the materials in their collections, but there is much more that they want and ought to do. However, there are limitations and uncertainties that prevent full implementation of a comprehensive preservation program. Nonetheless, preservation remains important to everyone — librarians for their clients, publishers for the historical record of their work, and the nation as a whole for a commitment to preserving the cultural achievements of the 19th and 20th cen-





turies. Librarians need to begin to work with publishers and Congress to identify ways to amend the law within the current framework to permit a full realization of a comprehensive preservation program in a way that does not interfere with the legitimate rights of the copyright owner.

REFERENCES

1 "Organization, Goals, and Activities of the Commission," p.2 (mimeo, n.d.).

2 Much of what is contained in this article is explored at greater length in the author's original work on the same subject: *Copyright and Preservation: a Serious Problem in Need of a Thoughtful Solution*, published by the Commission for Preservation and Access in Washington, DC, in September 1990. Copies of the paper are available from the Commission for $15.00.

3 For the most part, this article deals with published, not unpublished, works. Under the old Act, unpublished works were protected in perpetuity, or until they were published, by the states under a common law copyright doctrine known as the "right of first publication." The new Act protects unpublished works under Federal law from the moment of creation for the same time periods as published works. Under the new Act, however, no work that was unpublished as of January 1, 1978, will go into the public domain prior to December 31, 2002. As a result, all unpublished works should be presumed to be protected at least through that date.

4 See Copyright Law Revision Study No. 30, "Duration of Copyright," Appendix B (Committee Print, 1961).

5 To determine whether the copyright was renewed, one would have to check the renewals at the Copyright Office or in the *Catalog of Copyright Entries*. Even then, one cannot be sure because there might have been a change in ownership or the name under which it was recorded.

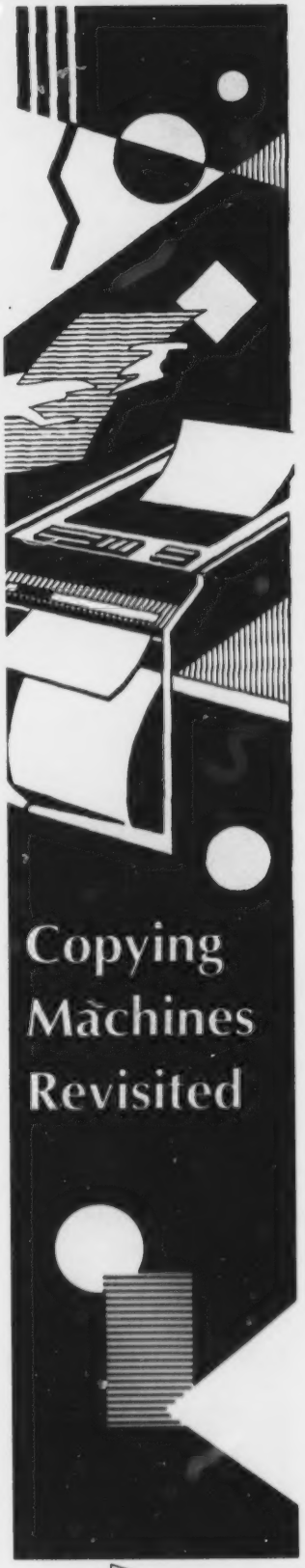
6 The legislative history of the section of the Act concerning public displays makes it clear that it was intended to give the copyright owner the right to control the distribution of the work electronically, just as the right to make copies gives the owner the right to control at least the initial distribution of paper copies.

7 The House Report specifically indicates an intention to limit such reproduction to microfilm or electrostatic process. See House Report 94-1476 at 75 (September 3, 1976).

Robert L. Oakley *is the Director of the Law Library and Professor of Law at the Georgetown University Law Center in Washington, DC. He is actively involved on a wide range of information policy issues now being debated and has written several articles on copyright, focusing most especially on copyright and preservation as well as copyright in the electronic environment. He is currently a member of the Executive Board of the American Association of Law Libraries, in addition to serving on the Depository Library Council and the Network Advisory Committee of the Library of Congress.*

FAX — A SPECIAL CASE

By David James Ensign



Telefacsimile technology is becoming commonplace in the library world. Its attraction is its ability to send hard copy documents at electronic speed to any remote location where another compatible fax machine is located. At first glance, it appears to be at least a partial answer to an old dilemma for libraries. We have long been able to communicate loan requests quickly between libraries through bibliographic utilities and other telecommunication systems. Document delivery has continued to be either slow or expensive, however, with libraries relying on the postal service or on couriers. Fax offers a way for libraries to deliver many types of documents in response to patron requests quickly, at a reasonable cost.

Telefacsimile, however, is not without its problems. The process involves the copying of materials that may be protected by copyright. §106 of the 1976 Copyright Act reserves to copyright holders the rights to reproduce and to distribute protected works. As with photoduplication, each time a librarian transmits a document using fax, she or he must consider whether the transaction is permitted under fair use or some other exception to the copyright law.

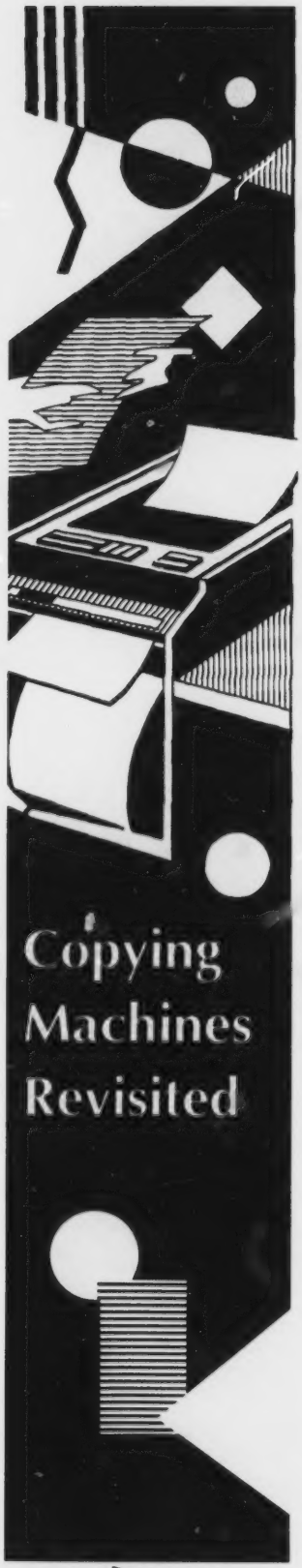
This article examines the copyright considerations related to three common patron transactions: interlibrary loans, intrasystem loans and direct patron requests. In addition to the 1976 Copyright Act, the guidelines of The Commission on New Technological Uses of Copyrighted Works (CONTU) and language from the House and Senate reports will be examined. While the guidelines and reports are not the law itself, they are often used by courts to interpret the law, and thus they have considerable weight in determining legislative intent and how the law might apply.

INTERLIBRARY LOAN

§108(g)(2) of the Copyright Act permits a library to participate in interlibrary arrangements. The borrowing library must not engage in interlibrary loan activity to such an extent that it will substitute for a subscription or for purchase of the protected work. CONTU promulgated guidelines that are generally accepted among libraries as defining appropriate levels of borrowing activity.

Fax as a technology should not present a problem to libraries wishing to transmit materials in response to interlibrary loan requests, as long as the usual copyright guidelines are adhered to. It is the responsibility of the borrowing institution to see that proper records are maintained that will prevent excessive borrowing. Liability for infringement might be incurred by the lending library if requests from any one institution clearly exceed what is permitted by the guidelines and by the law.

One concern with many of the standalone telefax machines is that a photocopy must often be made from bound material before the transmission can be made. Few of the telefax machines currently used by libraries permit transmission from bound materials placed directly on a glass platen. Thus, the process usually requires two copies to be made, one in preparation for transmission and another as a result of the transmission process. §108(g) provides that "[t]he rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of *a single copy* or phonorecord of the same material on separate occasions...."(emphasis added). Copyright holders are likely to argue that this language is mandatory and that the statute absolutely prohibits making more than one copy of protected material



requested through interlibrary loan. On the other hand, an argument can be made that the language is only directory and that §108(g)(2) and the CONTU guidelines emphasize the effect of interlibrary lending on the borrowing library, not the lending library. It is the borrowing library's duty to maintain records on such requests, and the law is concerned with the cumulative effect of interlibrary loan transactions to the borrowing library. If the copy made by the lender in order to facilitate transmission is destroyed after the transmission is complete, then the net effect to the copyright holder is the same as if only one photocopy were made and mailed to the borrower. This is one of many "gray areas" of the copyright law that has not been litigated. The library that chooses to fill interlibrary loan requests using telefacsimile needs to be aware of this possible problem and should have appropriate policies and procedures in place to insure that telefax copies won't be retained or reused by the lender.

INTRASYSTEM LOANS

In interlibrary loan transactions, the borrowing library is administratively unrelated to the lending library. Intrasystem loans may be distinguished from interlibrary loans as "borrowing or lending of library materials carried on between branches or departments within the same library system as determined by common funding." Libraries involved in intrasystem loans are "both the central library/headquarters and the branch libraries/departments of your library system or archives."[1]

Librarians employed within a large system with branch facilities, such as at university and public libraries, or by a private enterprise with multiple offices, such as a law firm with offices and library facilities in different cities, might be tempted to consider lending among such facilities to be interlibrary loan transactions. The CONTU guidelines make it clear that intrasystem lending was never intended to qualify as interlibrary loan. Intrasystem lending might be used for two purposes: to provide materials to a patron of a remote branch who is not employed by the parent organization; or, at private library facilities, to send materials needed by employees of the organization.

If the requested materials are being supplied directly to a patron at a public facility, the same restrictions apply to materials transmitted by fax as would apply to materials copied for the patron at a staffed copy center run by the library. §108(a) allows for such reproductions to be made and distributed, providing that there is no direct or indirect commercial advantage, that the facility is open to the public or available to researchers not affiliated with the parent institution, and that the reproduction includes a notice of copyright.

Whenever telefacsimile is added to library services, it is important for administrators to develop written policies and procedures.

There is some disagreement as to whether §108 allows libraries affiliated with for-profit institutions to provide reproductions. While an early Senate report indicates that this might be impermissible,[2] later legislative history suggests that if other provisions of §108 are met, it might be allowed.[3] Thus, a library in a for-profit institution providing copies under §108 could do so only in isolated, spontaneous instances, and not as part of a systematic effort or to provide multiple copies.

Even if the material is to be faxed among branches for use by employees of a for-profit organization, such copying may be permitted under §108 so long as there is no systematic effort to substitute copying for subscription or purchase. It is clear that for-profit organizations may not do so in accordance with a plan to substitute for subscription or purchase.

Under §108, a library in a profit-making organization would not be authorized to:

(a) use a single subscription or copy to supply its employees with

multiple copies of material relevant to their work; or

(b) use a single subscription or copy to supply its employees, on request, with single copies of material relevant to their work, where the arrangement is "systematic" in the sense of deliberately substituting photocopying for subscription or purchase....

Isolated, spontaneous making of single photocopies by a library in a for-profit organization, without any systematic effort to substitute photocopying for subscriptions or purchases, would be covered by §108, even though the copies are furnished to the employees of the organization for use in their work.[4]

Because of the speed with which materials can be transmitted from one branch facility to another, librarians may be tempted to realize savings in materials budgets by faxing materials among the branches or from the main library. This was specifically anticipated when the 1976 Copyright Act was considered, and the Senate disapproved of these arrangements.

"While it is not possible to formulate specific definitions of systematic copying', the following examples serve to illustrate some of the copying prohibited by subsection (g).

(1)...

(2)...

(3) Several branches of a library system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and the one subscribing branch will reproduce copies of articles from the publication for users of other branches."[5]

DIRECT PATRON REQUESTS

Some libraries may receive requests directly from patrons who contact the library by telephone asking to have materials telefaxed to them. Because the library is supplying the materials directly to the patron, this situation is analogous to one where the patron requests photoreproductions at a copy center staffed by library personnel. Such transactions do not qualify as interlibrary loan transactions because the material is being sent directly to the patron, and not to another library for the patron. As such, the library supplying materials directly to the patron via telefax does not qualify for the protection given under §108(g)(2) and interlibrary loan guidelines. Specifically, liability for copyright infringement is not shifted away from the library supplying the materials, nor from its employees.

The same restrictions outlined in §108(a) apply that were discussed above in connection with faxing material from one branch within a system to another for patron use. The copy should be supplied without commercial advantage and a copyright notice should be placed on the copy. Some libraries of for-profit institutions may not be able to supply materials using fax to patrons.

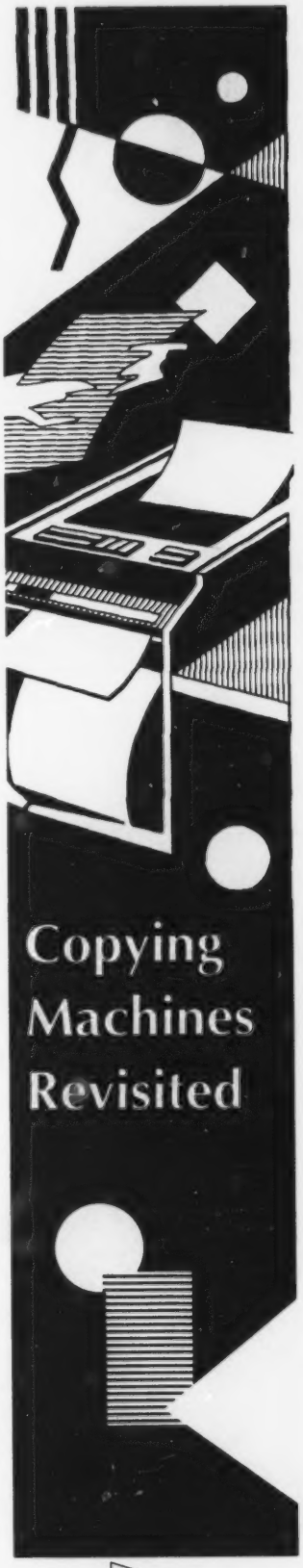
FAIR USE

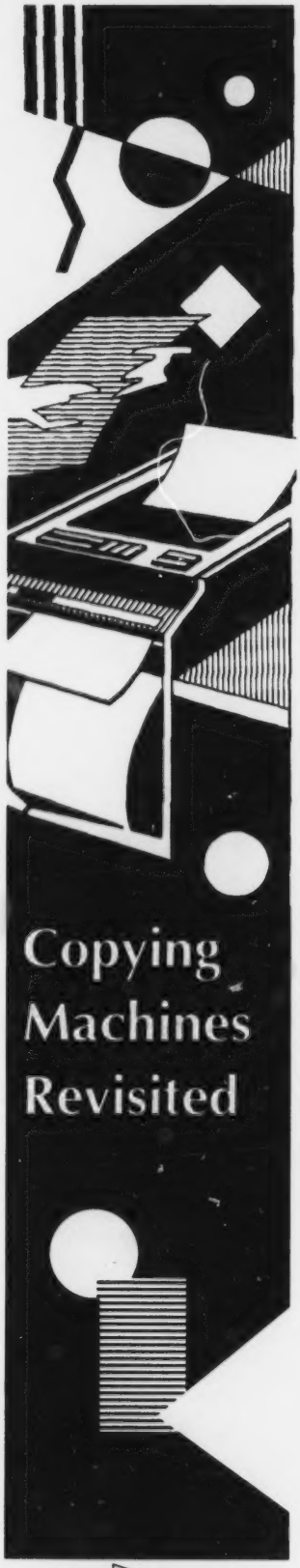
Since many libraries affiliated with for-profit organizations may make only limited use of telefax to supply documents for employees, they must rely on fair use for most such reproduction. Unfortunately, fair use can limit what may be transmitted.

Telefax may not be used to transmit materials routinely among libraries in a multibranch system.

§107 of the Copyright Act enumerates four factors to be considered in determining the fair use of copyright protected material:

(1) the purpose and character of the use, including whether such use is of a





commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

If the material is to be used for a commercial purpose, and if a substantial portion of the work is being faxed, then the use is less likely to qualify as a fair use. While the photoreproduction of an entire article for scholarly research was determined to be a fair use in *Williams & Wilkins Co. v. United States*,[6] reproduction of as little as 5 percent of a book for a commercial purpose was found to "weigh heavily against the defendant" in determining fair use in *Basic Books v. Kinko's Graphics Corp.*[7] Because of the limitations on the amount of a work that may be copied, it is unlikely that the telefax will be of much value for the purpose of transmitting materials among private libraries for commercial purposes.

CONCLUSION

Telefacsimile may be a quick and inexpensive way to deliver documents requested through interlibrary loan. Telefax may not be used to transmit materials routinely among libraries in a multibranch system. Transmissions among branches may only be permitted in spontaneous, isolated instances. Patron requests communicated directly to the library may be filled by telefax. In all cases, if the library is using equipment that requires that a photocopy of bound material be made in order to facilitate transmission, then librarians should be aware that a strict interpretation of §108 may mean that such transmissions are an infringement.

Whenever telefacsimile is added to library services, it is important for administrators to develop written policies and procedures. Telefax service can add a significant burden to existing staff and resources. The telefax technology has become sufficiently commonplace that there is great demand for document transmission. Library personnel and resources may not be able to adequately support the demand in all cases. Carefully written policies and procedures will help to avoid copyright infringement.

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3 H.R. Conf. Rep. No. 1733, 94th Cong., 2d Sess. 73-74 (1976).

4 H.R. Rep. No. 1476, 94th Cong., 2d Sess. 74-75 (1976).

5 S. Rep. No. 473, 94th Cong., 1st Sess. 70 (1975).

6 *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Cl.Ct. 1973).

7 *Basic Books v. Kinko's Graphics Corp.*, 758 F.Supp. 1522, 1527 (S.D.N.Y. 1991).

David James Ensign *is Law Librarian and Associate Professor of Law at the University of Louisville. He is the author of articles on copyright and librarianship, and a past member of the Copyright Committee of the American Association of Law Libraries. He has participated in several professional workshops related to copyright and libraries.*

THE MYTH OF LIBRARY IMMUNITY FROM COPYRIGHT INFRINGEMENT

*By Randall Coyne**

Polly Proprietor, a moderately successful pawnshop owner, sells a handgun and bullets to Reggie Robber. Robber tells Polly that he needs the gun because he intends to rob a nearby bank. Polly shakes her head in disgust and hands the revolver to Robber in exchange for $75 cash. While still in the pawnshop, Robber loads the weapon. He then marches directly to the bank. Robber approaches the nearest teller, brandishes his weapon and demands money. When the teller hesitates, Robber shoots and the teller is fatally wounded.

Back at the pawnshop, Polly learns of the bungled bank robbery and is visibly upset. Her distress escalates into terror, however, when officers arrive and arrest her as an accessory before the fact in connection with the murder at the bank.

And just what, you may rightfully be asking yourself at this point, does the parable of Polly Proprietor have to do with online catalogs? Simply (and perhaps shockingly) this: just as Polly may be criminally responsible because she sold a gun knowing that the purchaser intended to use it to commit a dangerous crime, librarians everywhere face the risk of copyright liability for the infringing activities of their employees and patrons.

Since the first xerographic image was produced more than 50 years ago, the copying industry has "growed like Topsy." Each year, billions of copies are produced and millions of dollars are generated. Not surprisingly, many of these copies are unauthorized reproductions of copyrighted works. Many of these infringing copies, moreover, are made on the premises of libraries, by library employees and patrons. Nonetheless, until relatively recently, library liability for copyright infringement seemed remote.

THE RISK OF LIABILITY

The myth of library immunity from copyright infringement may have originated in a much-heralded 1973 decision of the United States Court of Claims.[1] Williams & Wilkins Publishing Company sued the National Institutes of Health Library and the National Library of Medicine for copyright infringement. According to Williams & Wilkins, both libraries violated the copyright law by making unauthorized photocopies of articles contained in certain medical journals that Williams & Wilkins published.

The court disagreed. Several factors persuaded the court that the libraries were making fair use of the copyrighted material. First, both libraries were nonprofit organizations. Secondly, both libraries placed strict limitations on their photocopying practices. Thirdly, library photocopying was commonplace. Finally, because both libraries were engaged in the advancement and dissemination of medical knowledge, medical science would suffer grave injury if the photocopying services were discontinued.

Unscrupulous patrons pose a different challenge to libraries.

Since 1973, however, the general risk of liability for copyright infringement has increased dramatically, largely as the result of two related actions by Congress. In 1976, Congress passed the current version of the copyright law. In addition to codifying the fair use defense to copyright infringement, the new law included a section devoted entirely to certain types of library copying. The following year, Congress prompted the establishment of the Copyright Clearance Center to facilitate compliance with the copyright laws.[2] Taking Congress' cue, copyright owners have successfully sued corporations, copyshops, a university and even faculty members. In each case, publishers were able to extract favorable settlements from the allegedly infringing defendants. However, because these cases were settled by agreement of the parties without a definitive judicial ruling on infringement, their value as binding legal precedent was nonexistent and their significance was vastly underestimated.

That all changed on March 28, 1991, when copyright owners won a landmark judicial decision against Kinko's Graphics, a corporation consisting of 300 copyshops nationwide.[3] Kinko's admitted that two of its copyshops photocopied without authorization excerpts from the copyright owners' books and compiled them into course packets that were sold to Columbia University and New York University students. Kinko's

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argued, however, that its reproduction of the copyrighted materials was fair because the copies were made for an educational purpose. After all, the photocopying was done at the behest of college professors and the course packets were ultimately sold to college students.

The Federal district court disagreed and ordered that Kinko's stop its infringing activities and pay the copyright owners damages of $510,000, plus their court costs and attorney's fees. More important, copyright plaintiffs finally gained possession of a potent weapon for their anti-infringement arsenal: a decidedly favorable judicial decision that carried precedential value.

Now that publishers have drawn first blood in the battle over the reproduction of copyrighted materials, an increase in copyright infringement litigation is inevitable. And as copyright owners become more willing to sue to enforce their rights, the risks of library liability are certain to increase concomitantly. Even in cases where the illegal reproduction is committed by a library patron, libraries should expect to be sued along with the infringing patron. And why would a copyright owner seek to sue a library whose patron has violated the law? Perhaps the simplest answer is that given by Willie Sutton, a notorious criminal, who when asked why he robbed banks replied, "That's where the money [is]."

What of the librarian who observes a patron monopolizing the photocopier for hours at a time, stuffing a seemingly endless supply of dimes into the belly of the beast?

"VICARIOUS LIABILITY" AND "CONTRIBUTORY INFRINGEMENT"

Two related doctrines of copyright law, vicarious liability and contributory infringement, support the imposition of liability in certain circumstances for the acts of infringement committed by others. Under vicarious liability, a person who profits from the infringing acts of an another, and who has the right and ability to supervise the infringer, will be held liable. This branch of liability is rooted in the hoary concept of *respondent superior*, under which the master is held liable in certain cases for the wrongful acts of his servant. Consequently, ignorance of the direct infringer's illegal conduct would furnish no defense. Put more directly, libraries can be held liable for the infringing acts of their employees, even if the employees' supervisors are blissfully unaware of the infringing activity. Thus, whether or not detected by the library employer, the employee who engages in unauthorized photocopying of copyrighted material in excess of the amount permitted by law subjects both him/herself and the library employer to liability.

Less insidious but fraught with equal danger is the doctrine of contributory infringement. There are two branches of contributory infringement. First, anyone who *knowingly* induces, causes, or materially contributes to the infringing conduct of another may be held legally responsible as a contributory infringer. Conceivably, merely making a photocopier available to a patron you have reason to know is violating the copyright law by making unauthorized photocopies would constitute a material contribution to infringing conduct and trigger liability.

Secondly, anyone who provides another person with the means to infringe *knowing* that the person intends to infringe may be held liable. Therefore, the careless librarian who allows a patron to check out a copyrighted work knowing of the patron's intention to illegally reproduce the work may be found guilty of contributory infringement. Moreover, the librarian's attitude toward the patron's intention does not affect his or her culpability; that is no greater if the librarian condones or is indifferent about the patron's plans to violate someone's copyright than if he or she is praying fervently that the patron will recognize the error of his/her ways in time.

As repositories of vast collections of copyrighted materials, libraries are pregnant with the seeds of infringement. Additionally, in most libraries the tools of infringement abound. Modern libraries typically own several species of reproduction equipment ranging from photocopiers, microfilm and microfiche printers to audiocassette and videocassette recorders. This rather unique proximity of copyrighted materials and the tools of copyright infringement renders libraries especially amenable to copyright violations. Consequently, libraries may have a special duty — both legally and ethically — to guard against copyright infringement. Part of the difficulty in discharging this duty stems from the fact that the sin of illegal copying is committed with equal facility by overzealous employees and unscrupulous patrons alike.

The risk of vicarious liability posed by overzealous employees can be significantly reduced — if not completely eliminated — by library employers willing to take preventive measures. In particular, employee education coupled with supervision can effectively eliminate library liability for the infringing acts of employees.

So far, very few cases involving library liability for infringement have reached the courts. Consequently, libraries seeking to teach their employees how to comply with the copyright law must rely almost exclusively on the statute itself. Two separate but interrelated sections of the Copyright Act of 1976 are critically important. §107 provides an *exception* to copyright protection for certain "fair uses" made of copyrighted works. §108 provides an *exemption* from copyright liability for certain library services. Unfortunately, §107 is so general it provides very little guidance. Conversely, §108 suffers from the opposite problem of drowning the reader in prolixity. Nonetheless, charting a safe course through the choppy waters of library liability requires an understanding of both sections of the law.[4]

If a particular library (or archives) otherwise qualifies for the protections of §108, the library's employees will also be protected if they are acting within the scope of their employment. Put differently, if an employee is not engaged in the performance of his/her duties when he/she reproduces or distributes a copyrighted work, any protection from a claim of infringement he/she would otherwise enjoy evaporates.

Unscrupulous patrons pose a different challenge to libraries seeking to avoid contributory infringement. Fortunately, much of the risk of contributory infringement can be easily eliminated. When library patrons use reproduction equipment located on library premises (whether coin-operated or otherwise) to reproduce copyrighted materials, §108(f)(1) provides a relatively straightforward rule. Libraries and their employees that otherwise qualify for §108 protection will not be held legally responsible for the infringements of patrons using the library's reproduction equipment if two conditions are satisfied: (1) the use of the reproduction equipment is unsupervised; and (2) a notice is displayed on or near the equipment stating that the making of a copy may be subject to copyright law.

So, what of the librarian who observes a patron monopolizing the photocopier for hours at a time, stuffing a seemingly endless supply of dimes into the belly of the beast? Assuming the machine bears an appropriate copyright warning, the library would not be contributorily liable for the patron's infringements as long as the library does not supervise the patron's use of the machine. Although this "see no evil" defense to contributory infringement may be sound legally, ethically it leaves much to be desired. Notwithstanding a lack of legal duty, a librarian possessing a reasonable suspicion that a patron may be using library property to violate the copyright law may have a moral duty to investigate further. And if the investigation reveals that the patron is infringing, the librarian, at a minimum, should stop the infringement immediately.

REFERENCES

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2 The Copyright Clearance Center conveys rights to photocopy users to reproduce and distribute copies of materials from participating publications. Copyrighted musical compositions are regulated under similar systems operated by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).

3 *Basic Books, Inc. v. Kinko's Graphics Corp.*, 1991 WL 41671 (89 CIV 2807, S.D.N.Y.), Mar. 28, 1991.

4 A detailed explanation of these two sections is beyond the scope of this article. Those seeking further guidance may wish to consult Coyne, *Rights of Reproduction and the Provision of Library Services*, 13 U. Ark. Little Rock L.J. 485 (1991).

Randall Coyne *is Associate Professor of Law at the University of Oklahoma Law Center in Norman, OK. After graduating from Georgetown University Law Center (1986), Professor Coyne clerked for Judge Oscar H. Davis of the United States Court of Appeals for the Federal Circuit in Washington, DC. Professor Coyne is the author of several articles on intellectual property.*

FAIR USE AND UNPUBLISHED MATERIALS

By Sara Robbins

"Notwithstanding the provisions of §106, the fair use of a copyrighted work, including such use by reproduction in copies...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work."[1]

This §(107) of the Copyright Act of 1976 codified the common law doctrine of fair use and created the right to use copyrighted materials under certain circumstances. Unfortunately, issues such as what uses actually constitute "fair use," what types of materials are capable of fair use, and what circumstances allow for such use, all contribute today to a confusing state of affairs that is reflected in both the legal and literary worlds. Fair use of *unpublished* materials is just one aspect of the debate, but it is one currently undergoing significant legal activity in both the courts and Congress. Among those affected by this issue are librarians and archivists whose responsibilities include the administration of collections of unpublished materials, which generally encompass personal papers, letters, journals or diaries, and earlier drafts of or unfinished works.

The variety of elements implicated in this issue include, among others: 1) the policies behind copyright law, generally, and fair use, specifically; 2) the "unpublished" nature of materials; 3) the "idea vs. expression" debate and its role in the fair use analysis; 4) the use of unpublished sources by researchers, scholars, journalists and others; and 5) the role of librarians and archivists.

It is vital that one remembers the policies behind copyright law and the protections it provides: to promote the public welfare and the betterment of society through the creative efforts of authors, artists, and scientists. By affording such individuals appropriate incentives and protection, copyright makes it possible for them to produce such works. This basic concern is reflected, first in the U.S. Constitution, and subsequently in the various copyright acts enacted by Congress since 1790. Article I, §8, cl. 8 of the Constitution gives Congress the power: "To promote the progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings." The Constitution, through Article I, §8, cl. 18, also grants Congress the power to enact those laws necessary to implement this power, and it has so acted, with the latest effort being the 1976 act.

This legislative activity has been supplemented by a history of judicial activity that has expanded upon the law of copyright, creating many common law rights and protections. One such development was the common law doctrine of fair use, which permitted individuals, not the copyright owners, to use otherwise copyrighted materials without the consent of the copyright owner, so long as this use was justified. Such use, if justified, could be asserted as an equitable defense to claims of copyright infringement. In *Folsom v. Marsh*,[2] the court articulated various factors to be considered in the analysis of whether or not a use was justifiable:

> ...nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work.[3]

This concept of fair use recognized that copyright owners did not possess an absolute monopoly over their works, as this would only subvert the underlying policy of copyright by limiting access to and use of the copyrighted works. "The fair use doctrine strikes a balance between the policies of fostering creativity and encouraging wide dissemination and use of creative works."[4] In one of the major cases debating this issue, *Williams & Wilkins Co. v. United States*,[5] a publisher of medical journals sued the National Institutes of Health and the National Library of Medicine for copyright infringement, because of their photocopying of entire articles from medical journals at the request of medical

researchers. The Court found that the benefits to be derived by the dissemination of the information contained in these articles justified such use of the copyrighted works, especially in light of insufficient proof of injury suffered by the publisher in terms of subscription revenues:

> Although both harm to the publisher and harm to medical progress were far from certain, an adverse effect of a finding of infringement on medical research appeared more imminent and more important than a somewhat speculative decrease in the publisher's income.[6]

The various factors articulated by the courts were ultimately codified in the 1976 copyright law, which made fair use an exception to the exclusive rights granted copyright owners, rather than a defense to an action of copyright infringement. With this codification, Congress clearly stated its intention not to change the law: "§107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[7]

Yet this is, in fact, what appears to have happened. Prior to the 1976 act, only published materials were afforded statutory copyright protection; unpublished materials received protection through common law copyright, which granted perpetual copyright protection to these materials, until such time as the copyright owner chose to publish them. Several theories were implicated in this common law doctrine, including the presumption that until or unless an author publishes his or her work, he or she has signified an intent *not* to publish, a right of privacy afforded individuals and their families, and a right or freedom *not* to speak. Under this common law right, special deference was given to unpublished materials, especially letters, such that it was never "fair use" to use these materials without the consent of the copyright owner. With the passage of the 1976 act, unpublished materials were incorporated into law, since copyright protection attaches as soon as a work is fixed in a tangible medium of expression, regardless of publication.[8] Although these materials are now subject to the fair use analysis described in §107, in fact the statute also prohibits any unpublished materials from entering the public domain before December 31, 2002. [17 U.S.C. §303 (1988)]. At that time, the unpublished materials of any individual who has been dead for 50 years will lose copyright protection.

While many cases have addressed the various factors to be considered under §107, those involving unpublished materials have considered the "nature of the work" to be of prime importance and, in fact, often determinative of the issue. The common law presumption against fair use of unpublished materials appears to be alive and well.

There have been several major cases addressing the use of unpublished materials in the last 15 years. These include *Harper & Row v. Nation Enterprises*,[9] *Salinger v. Random House*,[10] *New Era Publications Int'l v. Henry Holt & Company*,[11] and *Wright v. Warner Books*.[12] In order to understand the current state of the law, a brief review of each of these cases is appropriate. [*Editor's Note*: See the article "News from the Courts" by Joanne D.S. Armstrong on pages 111-117 of this issue.]

The Court seems to be interested in securing the role of libraries and archives in the research process and the creative efforts of authors and scholars

Following the *New Era* decision in 1990, both the House and Senate introduced identical bills, H.R. 4263 and S. 2370 respectively, seeking to amend §107 to include specifically the words "whether published or unpublished" after "fair use of a copyrighted work." According to Representative Kastenmeier, sponsor of the House bill, the purpose of the bills was to "give the courts sufficient flexibility in making both a fair use determination and a decision about whether injunctive relief is appropriate."[13] The impetus was a fear of a *per se* rule against fair use of unpublished materials that appeared to be resulting from the line of cases, which failed to take into account the original intent of both the Constitution and the 1976 act. During the hearings conducted by House and Senate subcommittees, testimony was heard from Ralph Oman, the Register of Copyrights, and written testimony was submitted by the American Association of Law Libraries and the American Library Association in conjunction with the Association of Research Libraries, among others. Each of these witnesses expressed concern that the cases, as decided by the Second Circuit, would have a chilling effect on legitimate, fair uses of unpublished materials, as well as impose significant burdens upon those responsible for the administration of such materials. However, concerns were also expressed about legislative interference with judicial activity and whether the proposed amendment would in fact accomplish its goal. Further discussion led to the suggestion that fair use for such materials be explicitly limited to "history, biography, fiction, news and general interest reporting, or social, political or moral commentary."[14] The bill was

not voted on during the remaining months of the 101st Congress, and so died.

This did not stop legislative action, though. In May 1991, new bills, S. 1035 and H.R. 2372, were introduced that proposed adding the following language to the end of §107:

> The fact that a work is unpublished is an important element that tends to weigh against a finding of fair use, but shall not diminish the importance traditionally accorded to any other consideration under this section, and shall not bar a finding of fair use, if such finding is made upon full consideration of all the above factors.

The Senate bill was passed in September 1991 and referred to the House Judiciary Committee in October. The House, whose bill also covered other issues, dropped the fair use provision in November; it has not yet considered the Senate version. On March 5, 1992, a new bill, H.R. 4412, was introduced in the House, recommending the inclusion of the following at the end of §107:

> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the factors set forth in paragraphs (1) through (4).

On March 12, 1992, this was approved by the subcommittee.

Once again, these bills aim to "clarify the application of the fair use doctrine to unpublished works, in response to recent decisions of the United States Court of Appeals for the Second Circuit."[15] The Senate committee report states explicitly that the bill intends to overrule the Court's "overly restrictive language of Salinger and New Era with respect to the use of unpublished materials and to return to the law of fair use as it was expressed in Harper & Row." Congress is seeking to give proper, but not undue, consideration to the nature of unpublished materials in the fair use analysis. The result should be a balance between the dissemination of creative ideas and the protection of creative expression. According to the committee report, the Senate bill is intended to apply only to uses of letters, diaries and similar materials; it does not affect the principle of fair use as it applies to unpublished business or technical documents or unpublished computer programs. Since there are now two different versions attempting to accomplish the same result, the differences will have to be ironed out by a conference committee. It will be interesting to see what ultimately develops.

THE BALANCE OF RIGHTS

The use of unpublished materials by researchers, scholars, journalists and others raises fascinating questions on the balance of rights under copyright law. Congress consciously included unpublished materials in its enactment of the 1976 law, but also specifically included two exceptions to guarantee the public's right of access to the entire range of materials now covered by the law. These exceptions are fair use and the right of reproduction by libraries and archives, so long as certain requirements are met. They recognize the need of authors, researchers and others to selectively use the contents of unpublished materials, in reality the efforts of another, in order to produce subsequent works, thereby advancing the public welfare through these new creative efforts.

The process of scholarly research demands that responsible practitioners draw upon and even quote from unpublished materials in order to reveal the "truth" about the subject. Yet the subjects, their families, and other interested parties often seek to prevent such disclosures, viewing them as invasions of their privacy and contrary to their rights not to have the contents revealed to a curious public. Biographers have been sued for defamation, invasion of privacy and breach of contract, among others, including the already described actions against the unauthorized use of unpublished materials. Significantly, much of this litigious activity has come about subsequent to the enactment of the 1976 law. Under the common law doctrine,, apparently, the use of unpublished materials, including quotations, was more widely accepted.

The consequence of this change has been a chilling effect on the efforts of biographers and other serious researchers. Among the results have been the cancellation of some works, the revision of manuscripts deleting all quotations or close paraphrases, and the transformation of expression into fact without provision of the supporting texts or sources. One author has written that

> the inability to use quotations as fact to support a controversial or unusual interpretation discourages insightful and meaningful biographies. In their place will appear books that reinforce popularly accepted "truths" about the subject and avoid primary document research; after all, what's the point of research if a good unpublished quotation can be used only where the biographer can find some way to rephrase it as a "fact."[16]

Failure to meet the standards articulated in the cases can result in injunctions against the publication of the infringing materials and/or the award of substantial damages. The law, as developed in the recent cases, at least up to the latest Second Circuit decision in *Wright v. Warner Books*, has placed a significant burden on the biographer or researcher to seek consent from the copyright owner or else not use the unpublished materials.

Complying with the law requires the researcher to identify, locate and contact the copyright owner of every item to be used. This can be extremely difficult, especially with the passage of time. Among the complications may be identification of and communication with the writers of letters, who may have changed their names, moved or died.

The very narrow interpretations have had the effect of inhibiting the creative works the 1976 act intended to guarantee.

While the actual effects of these cases are not yet clear, testimony from the July 1990 hearings on the first "fair use" bills indicate that both authors and publishers are reconsidering their use of such materials. The efforts required can be overwhelming, and, even with such efforts, success is uncertain because of the copyright owners' increasing desire for privacy. Families may be concerned with protecting not only themselves but also the image of the author of the unpublished materials; they may be more interested in remuneration for the use of the materials than the author was; they may not understand or even respect the intentions of the author regarding the publication of these materials. Often, authors have requested that their unpublished works be destroyed upon their death or subject to limited access by others; yet, many families and heirs have ignored these directives. This has led to concern that authors may choose to burn their materials rather than face undesired actions upon or uses of them. It is also possible that, in order to use the materials, a researcher may be required to become an "authorized" biographer, subject to the demands of the copyright owners. The very narrow interpretations have had the effect of inhibiting the creative works the 1976 act intended to guarantee.

Libraries and archives may also be affected by these developments. It is important to remember three points: First, the donation of unpublished materials to a library or archive has no effect on the copyright protections afforded these materials on the rights of the copyright owners. Second, §108 of the copyright law grants libraries and archives the right to reproduce unpublished materials within their collections, provided certain conditions are met. Included in this section is the right of users to make copies of library materials for scholarly or research purposes. Third, under the law, all unpublished materials created before January 1, 1978, have copyright protection until at least January 1, 2003; all works created after January 1, 1978, have protection until at least 2028. To these considerations must be added the doctrine articulated in the above-mentioned cases, which seems to restrict the use of such materials in research libraries, contrary to both constitutional and legislative intent. The result is a confusing state of affairs for libraries and archives. It has even been suggested that libraries could be held liable for contributory infringement should scholarly uses of such materials not be considered fair use.

Many libraries have required researchers who wish to access unpublished materials, including letters, journals, diaries, earlier versions of published works and unfinished works to sign contractual agreements that may include restrictions on the use of such materials. The agreements may require special permission to use unpublished materials, separate permission from the library or its agent to publish such materials wholly or in part, and permission of the copyright owners for certain other uses. Libraries generally make no representation that they are the copyright owners of the materials; in fact, they affirmatively act to counter any such impression by specifically distinguishing, in permission letters and other documents, between the physical ownership of the materials and the ownership of literary rights or copyrights in the same materials.

The *Wright* case included as one of its claims that Margaret Walker, the biographer, violated an agreement between her and Yale University's Beinecke Library on the use of the Wright materials. The Second Circuit read the agreement very narrowly, finding that the phrase "may not be published in whole or in part" did not encompass "paraphrasing of facts or ideas, nor even of expression contained in the manuscripts,"[17] but rather "publication" in its most exact definition. The Court could not accept an interpretation of such an agreement that would permit a library to provide access to these materials but then prohibit any meaningful use of them by scholars and researchers. Accepting the conclusion of the District Court opinion in *Salinger*, this Court refused to read into such access agreements greater protections for copyright owners than can be found in the copyright act itself. It also quoted the concern expressed by the District Court in the instant case:

> Indeed, any more restrictive interpretation of the agreement on the use of the collected materials would amount to a finding that Yale University sought to prevent the airing of historical facts rather than the unfair exploitation of another's creative imagination or style — a finding at odds with the very purpose of a great university.[18]

The Court seems to be interested in securing the role

of libraries and archives in the research process and the creative efforts of authors and scholars as intended under the Constitution, in addition to their role of making such materials accessible to the public by continuing to serve as repositories for them. This also serves to benefit society and promote the general welfare.

In order to maintain such roles, libraries and archives must continue to exercise caution in and control over the use of unpublished materials. Yet it is possible to overcompensate, to be more conservative than required. Some access agreements include restrictions on the use of reproductions of such materials. The Harvard Law School Library, for example, includes in its Application for the Examination of Manuscripts the following paragraph:

> If this application includes a request for photographic or other reproduction of any manuscript listed below, I agree that the reproduction is to be made solely for my convenience in examining the manuscript: that it is to be returned upon completion of my work; that the reproduction will not itself be reproduced; and that it will not be examined by or transferred to any other person or institution without the prior permission of the Librarian of the Harvard Law School Library.

This may be unnecessary protective action, and it may, in fact, interfere with the rights granted to users by §108(d). Yet who can blame institutions for trying to thus insulate themselves from burdensome responsibilities and costly lawsuits?

It has been suggested that libraries and archives may have to assume the role of securing the proper permissions from copyright owners for materials in their collections, a function normally carried out by authors and researchers themselves. The effort for institutions would multiply exponentially, given the number of individuals who would demand such assistance, the costs would be prohibitive, and the legal responsibility for the results of such efforts, in the aggregate, would be intolerable.

Evidently, the current state of affairs regarding fair use and unpublished materials is quite unsettled. Through the line of cases starting with *Harper & Row v. Nation Enterprises* and continuing to the District Court opinion in *Wright v. Warner Books*, there seemed to be a consistent narrowing of any legitimate uses of unpublished materials by biographers and other researchers. Congress appears intent to halt this trend, to secure at least limited fair use. The Second Circuit, in its opinion on *Wright*, whether through its own initiative or in response to Congressional activity, then took steps to provide judicial guidance and support for the balancing of the various interests involved. It is unclear what impact this decision will have on the pending legislation. Already the relevant provision in H.R. 2372 was dropped because the subcommittee was persuaded that the appellate decision resolved the problem. Yet, just in March 1992, a House subcommittee approved H.R. 4411. With two differing versions pending, the prospect of legislation is just as uncertain.

Where scholars and researchers, libraries and archives stand now as regards appropriate conduct is also unclear. Two major courses of action are available: to follow the most narrow interpretations of the courts, with their *per se* presumption against fair use of unpublished materials, in order to be safe from charges of copyright infringement; or to accept the reasoning of the latest case and the presumed intent of pending legislation and require all involved, including authors, scholars, researchers, publishers, libraries and archives, to evaluate the planned uses of such materials in light of the criteria provided in §107, and then act responsibly. Either path will impose burdens on the participants, possibly significant consequences on the products of the creative efforts, and possibly the risk of litigation and monetary damages. Until there is further clarification by either the courts or Congress, all participants in this process will have to made conscious, deliberate choices as to the approach or approaches to follow.

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Sara Robbins *is Law Librarian and Associate Professor of Law at Brooklyn Law School in New York. She is the compiler and editor of several works, including the recently published* Law: a Treasury of Art and Literature. *Professor Robbins has served as a member of the American Association of Law Libraries Committee on Copyright and has given lectures and moderated programs on copyright issues relating to libraries.*

CIRCULATING MEDIA IN PUBLIC LIBRARIES: WHAT IS LEGAL? WHAT IS SAFE?

By Mary Keelan

The issue of the copyright law and audiovisual and multimedia materials in libraries, especially public libraries, has many potential pitfalls that were hardly thought of two or three years ago. Before 1990, the American Library Association and the American Film and Video Association (formerly the Education Film Library Association) sponsored panel discussions with speakers from AIME (Association of Independent Media Exhibitors) and MPAA (Motion Picture Association of America) who were educating and exhorting librarians to abide by public performance video "laws," rights concerning duplication and legal distribution, restrictions on interlibrary loan of media materials, and licensing regulations. The 1990s are hardly under way, and already the front line librarian has to deal with all of the above as well as the new copyright questions raised by the *new* multimedia.

The copyright law for librarians circulating media materials, as understood before 1990, and circulating, creating and using *multimedia* in the post-1990 meaning of the term, needs reexamination, for "Already, to ensure a democratic distribution of information through new technology, libraries are playing a role in the restructuring of intellectual property policy that will empower society in the next century."[1]

In the pragmatic world of the public librarian, issues of copyright and media materials loom in the background, or the foreground, on a daily basis. For instance, what appears on the surface to be a simple transaction of circulating a video raises an array of copyright issues, daunting to the most knowledgeable. It is a true Scylla and Charybdis experience.

My introduction to this experience dates to 1985 during my first month as Head of the Audiovisual Department at the Mid-Hudson Library System. I received a call from one of our member libraries in Dutchess County that had just received a "cease and desist" letter from a prominent Madison Avenue law firm (see Exhibit #1). The "cease and desist" referred to the showing of video tapes for children's programs in the library. Though the words "public performance" were part of my audiovisual vocabulary, the programming of video tapes was a recent phenomenon in libraries and the copyright issue was somewhat theoretical — hardly one that I felt would threaten a member library and, by extension, the Mid-Hudson Library System. However, when a lawyer on the member library board asked to meet with the Director of the Mid-Hudson Library System and me to determine a response, "public performance" was more than theory! In the next few months, I made it my business to learn everything I could about copyright law for video in public libraries. What came out of that "crash" self-study course evolved to a continuing interest and sense of **protection** of our libraries and is the underpinning for this article. However, I also need to observe that in 1992 the copyright "waters" for media in public libraries are as murky and turbulent as they were in 1985.

I am concentrating on public libraries because the law differs when it comes to use in schools and universities (see Exhibit #2). Since video is the most popular nonprint material currently circulated in libraries, my major focus is on this format, with some reference to the other media formats.

Because much in the copyright law for public libraries and media has not been tested in the courts, numerous interpretations abound in the marketplace, and they contribute to the confusion. Copyright laws on video usage affecting public libraries fall into categories of licensing such as: home; public performance; duplication; and cable.

PUBLIC PERFORMANCE RIGHTS

According to the copyright law of 1976, libraries must have *public performance rights* on any video title to be programmed in the library.[2] These rights are also necessary for borrowing by an agency, such as a parents-teachers association (PTA) or the United Way, for programming. But what are public performance rights, and why do libraries need them?

Public performance rights, or *public performance video rights* (PPV) refer to a specific copyright license on a given title and the conditions of purchase or rental that allow that title to be programmed in a room, auditorium or carrel in a public place, such as a library. *Public performance video rights* differ from *home use rights*, which permit a title to be shown in a private setting among family members, and *other use rights*, which cover cable or television programming and *duplication rights*.

One of the main issues driving the PPV rights perplexity is "double pricing," which adds $200-400 to the purchase price of a video to pay for *public performance*

[Exhibit #1]

LAW OFFICES
SARGOY, STEIN & HANFT
105 MADISON AVENUE
NEW YORK, N. Y. 10016
(212) 889-1420

BURTON H. HANFT
JEFFREY A. ROSEN
HARVEY SHAPIRO

EDWARD A. SARGOY
1902-1983
JOSEPH L. STEIN
1900-1981

February 21, 1985

Certified Mail
Return Receipt Requested

Hyde Park Free Library
Mid Hudson Library System
Hyde Park, New York 12538

Ladies and Gentlemen:

We represent the following motion picture producer/distributors in connection with the matter set forth below:

Buena Vista Distribution Co., Inc.
Columbia Pictures Industries, Inc.
Embassy Pictures
MGM/UA Entertainment Co.
New World Pictures
Orion Pictures Distribution Corporation
Paramount Pictures Corporation
Tri-Star Pictures
Twentieth Century-Fox Film Corporation
United Artists Corporation
Universal City Studios, Inc.
Walt Disney Productions
Warner Bros. Inc.

We have received information that Hyde Park Free Library has been publicly performing prerecorded videocassettes, to which the above-noted clients own copyrights in violation of the exclusive rights of these copyright owners.

Our clients own copyrights in various motion pictures, cassettes of which are offered for sale or lease. However, the purchase or rental of such a cassette does not permit the purchaser or lessee to publicly perform that cassette unless a separate license is obtained from the copyright owner, or a person authorized by him to issue such licenses to perform such cassettes publicly.

One of the rights reserved to the copyright owner, which remains with the copyright owner and is not transferred to the purchaser or lessee of a cassette, is the right "to perform the copyrighted work publicly" (17 U.S.C. §106(4)). Section 101 contains the following definition of that phrase:

> "To perform or display a work 'publicly' means —
> (1) To perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered;"

Since a library is a place "open to the public," unauthorized performances infringe the exclusive right to "perform...a work 'publicly'," unless the performance is exempted under 17 U.S.C. §110.

We hereby demand that you cease and desist immediately from infringing performance of videocassettes. We reserve all rights for past infringements of our clients' copyrighted motion pictures.

The promptness and substance of your response will play a substantial role in each client's decision to institute further measures in this matter. If you have any questions regarding the contents of this letter, please do not hesitate to call this office.

Sincerely yours,

SARGOY, STEIN & HANFT

By: Harvey Shapiro
Harvey Shapiro

HS:nl

video rights. The producers maintain that the larger audiences reduce their just revenue and that they should be compensated accordingly. Most producers feel strongly about this issue. Recently, a producer speaking at ALA to an audience of 400 librarians announced that any library caught violating the *public performance video* regulations would be prosecuted. Legal representatives from the Motion Picture Association of America (MPAA) have also openly threatened libraries with lawsuits at meetings of the American Film and Video Association.

There are a few practical ways to minimize the financial effects of double pricing: 1) Have systems or state libraries purchase *public performance video rights* and remove this onus from the local library. 2) Have public libraries, at the local level, participate in a buying consortium that negotiates rights "up front" on behalf of all participants.[3] This is a direction that a "grassroots" movement of public library system audiovisual consultants in New York State has taken and is quite successful from the point of view of both the libraries and the distributors. 3) Take the approach of the New York State correctional facilities and purchase blanket licensing on theatrically released video that permits *public performance* usage. (Correctional facilities were designated public places and *home use only video* could not be used without *public performance rights*, an argument that correctional facilities tried to fight alone and had to capitulate to the distributors.)[4]

A seminal article articulating the complexity of the *public performance rights* issue was published by *American Libraries* in 1989.[5] When ALA's Video and Special Projects office was actively consulting on behalf of libraries in 1989, Thomas Galvin and Sally Mason tried publicly in *American Libraries* and at behind-the-scenes meetings of ALA representatives, distributors and AIME[6] to reconcile the ambiguities of the law and double pricing. They determined that "the bottom line is that the copyright law *is* ambiguous. There *are* no simple, unambiguous answers to these troubling questions."[7]

Public performance rights issues are not just theoretical. Recently, a Mid-Hudson Library System member library faced the following problem. A patron offered to augment the library's video collection by donating an extensive private collection of Hollywood classics from the 1940s and 1950s, all in excellent condition. The patron made one stipulation: the library would have to program the films or offer them for programming, with the patron supplying appropriate accompanying material. The library had to decide if it should accept the gift, and, if so, could it program titles where the *public performance rights* were not clear.

The first part of the problem is easy to resolve. Accept the gift if it fits into the library's overall collection development policy. Then have the Mid-Hudson Library System's Audiovisual Department check to see if it owns any of the titles and if it has *public performance rights* for those titles. If the system does own any of the titles, and has rights, the library can honor the stipulation for programming by substituting a Mid-Hudson Library System *public performance video* copy. Some older movies are in the public domain; here the *public performance* issue is moot. However, it is difficult to determine with accuracy if a title is in the public domain.

Another example of a video use and copyright problems occurred recently when a patron requested a Mid-Hudson Library System video for an unusual use. The patron was a consultant for a company that was contracting with airlines to show quality children's video on cross-country and intercontinental trips. Could the company borrow videos from the Mid-Hudson Library System from distributors such as Weston Woods, Phoenix and Churchill for showings over a month's time? The only reason the situation came to my attention was that there had been a request for an additional loan period. What the patron did not realize is that Mid-Hudson Library System videos, no matter what the rights, could not be borrowed for showings where a person had to pay to see them (even indirectly through a plane ticket), since paid performances require separate license/rental agreements. The patron was advised to contact the companies directly and request rights for showing their videos on flights. The bottom line here is that even high-priced public performance videos cannot be used where a fee is involved. Events that use a library video as part of a fundraising campaign fall under the same regulations.

HOME USE RIGHTS

Some of the terms associated with copyright for media are unfortunate. *Home use* is one of those terms. What it really means is the opposite of public performance; it implies that there will be no public performance in someone's home. However, the policing of such use is almost impossible. If a patron borrows a video from a library, ostensibly to use it for personal showing, and decides to invite the "garden club" to his or her home media center to see it, that activity would be *public performance*. *Home use only* refers to the limited rights, mostly on theatrically released videos, for showings in the home among familial/related persons. For instance, videos from most video stores are *home use only*, and almost all videos distributed by jobbers such as Baker & Taylor and Ingram are for *home use only*.

DUPLICATION RIGHTS AND ARCHIVAL COPIES

Many librarians assume that they may make an

archival copy of a video, so that if one copy is circulated and lost or damaged the archival copy may be used as a master to make another circulating copy. This is a misinterpretation of *duplication and archival rights*. These are rights that allow for the copying of a videotape and are secured when the tape is originally purchased. They may only be given by a distributor/producer who holds the rights, not by a jobber. The only exception on archival copying is when the librarian knows for a fact that the title is the last one in existence and the distributor is either unknown or unreachable; then an archival copy can be made. In general, public libraries should not make archival copies.

Since 1988, the Mid-Hudson Library System has negotiated or leveraged duplication rights on approximately 1,000 titles. Many of these are in a special collection on substance abuse and mental health, where the intent was to avoid excess inventory yet provide service to agencies and patrons without their incurring denials when they booked (reserved) a title for a particular date.

The negotiation of blanket duplication rights is a fairly complex endeavor that should be done only at the system or state level. The reason for this is that the rights involve considerable amounts of money, but if a quantity of materials is being purchased from a particular distributor who holds the rights, the cost can be leveraged. Whenever legitimate duplication of video occurs, the duplicated tapes hold all of the rights (usually public performance) of the master copy. Home-use-only tapes can almost never be duplicated legitimately. That is why the F.B.I. warning appears prominently on almost all home-use videos.

A dilemma occurs for the librarian when a student wants to view *Born on the Fourth of July* in the library for a term paper on the Vietnam era. This is home-use-only video, but does the usage fall into a "fair use" exemption? According to Ivan Bender, Esq., "Performance of a video in a public library requires a license. In my opinion, this is what the law says, and no distinction is made between viewing by an individual, a small group, or a larger group. A public library is a place "open to the public" that is part of the definition of "public performance" in the statute."[8]

CABLE, SATELLITE AND MULTIMEDIA

Until quite recently libraries had no need for *cable rights* on materials they would purchase. However, libraries are becoming increasingly active in cable access programs. Therefore, it behooves a library, or preferably a system or state-coordinated purchaser, to negotiate *cable rights* up front.

Recently I received an urgent request from a cable company in Kingston, NY, to show some of our substance abuse and mental health videos on cable television. The cable company was willing to "frame" the showing with an advertisement of the availability of the collection at the local libraries. As enticing an offer as this was, I could not authorize it because we did not have any *cable rights* on the requested videos. It meant going back to the original distributor/producer and requesting rights. Securing rights at this late date would probably cost considerably more than if they had been included in the original purchase price. I highly recommend that libraries, systems, or state libraries negotiating videos with multiple rights request *cable rights* at the time of purchase.

In the not too distant future, libraries will also need rights for long-distance learning programs and satellite downlinks. However, the companies, though aware of these usages, are, for the most part, not yet prepared to deal with the copyright issues involved. When I spoke with Ivan Bender for AIME, and with Maria Diecedue of Modern Talking Pictures, which has an extensive satellite program, both concurred that copyright issues relating to the new technologies had not been delineated clearly by distributors. Mr. Bender advised that the copyright law as stated covered the new technologies.

Another murky issue of the 1990s is the creation of new works from multimedia products. The best interim solution is to check with the distributor and, preferably, also the originator of these products and ask for clarification in writing. This advice applies to such products as IBM's *Columbus: Encounter, Discovery and Beyond*, but not to the "free of copyright restrictions" of the Library of Congress' *American Memory Project*. IBM encourages the use of the *Columbus* video to "restructure educational research," "promote creativity and imagination," and "plan their own course" with "180 interactive hours of multidisciplinary content." Though it is a "tool that educators and learners can use to customize, modify, present, and research content,"[9] no one is clear about the law as it applies to any new product created. If ever there were choppy copyright waters, they surround the multimedia technology. As Arthur Fakes pointed out in an American Society for Information Science (ASIS) workshop, "...the new technology creates new legal issues, and...the development of the law lags (behind) the development of technology."[10] The emphasis is on signed license agreements between libraries and vendors, certainly an appropriate recommendation for those purchasing IBM's *Columbus: Encounter, Discovery and Beyond*.

While libraries are encouraged to comply with copyright laws, compliance should not discourage an expansive and diverse approach to collection development of media and multimedia materials. Librarians, through state and national associations, need to keep communicating with distributors to each group's mutual benefit.

Today's librarians face the challenges presented by advances in information technology just as librarians have since Gutenberg's, Caxton's and de Worde's day:

> "One of the most exciting things about the new digital technology is the way in which it empowers people. Users will have the ability to modify digital information they receive from others and reuse it in their own fashion. Everyone will be able to mix, combine and network text, sounds, still and motion images. We are entering an era of unprecedented democratization in the means of expression and the means of communication. We are going to have to learn to think in new ways to exploit the nonlinear nature of the interactive media of the future. We are also going to have to think hard about how we strike the balance between creative freedom and protection of intellectual property."[11]

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Mary Keelan *is Head of Audiovisual Services at the Mid-Hudson Library System and Manager of the New York State Union Catalog of Film and Video (NYSCAT) and the New York State Substance Abuse Prevention Through Video Education (NYSAVE) projects. She is the 1990 recipient of the Joan Clark Award of the New York Library Association's (NYLA) Film and Video Round Table for excellence in media librarianship. Previously, she has published in* The Bookmark *on censorship and media and the publishing of NYSCAT.*

LIBRARY AND CLASSROOM USE OF COPYRIGHTED VIDEOTAPES AND COMPUTER SOFTWARE

By Marv Hutchings Reed and Debra Stanek

Marv Hutchings Reed is a partner in the law firm of Sidlev & Austin, Chicago, and counsel to the American Library Association. Debra Stanek will graduate in June from the University of Chicago Law School.

After receiving numerous queries regarding library use of copyrighted videotapes and computer programs, I asked ALA attorney Marv Hutchings Reed to prepare a paper that would address the issues that librarians had brought to my attention and offer some guidance. The result is the following which we've published as an insert so that it can be removed and posted for ready access. A longer, more detailed article by Debra Stanek, "Videotapes, Computer Programs and the Library," will appear in the March 1986 issue of *Information Technology and Libraries*. These papers express the opinion of ALA's legal counsel; individuals and institutions deeply involved in copyright matters should consult their own attorneys. *Donna Kitta, Administrator, ALA Office of Copyright, Rights & Permissions*

I. VIDEOTAPES

The Copyright Revision Act of 1976 clearly protects audiovisual works such as films and videotapes. The rights of copyright include the rights of reproduction, adaptation, distribution, public performance and display. All of these rights are subject, however, to "fair use," depending on the purpose of the use, the nature of the work, the amount of the work used and the effect the use has on the market for the copyrighted work.

Libraries purchase a wide range of educational and entertainment videotapes for in-library use and for lending to patrons. Since ownership of a physical object is different from ownership of the copyright therein, guidelines are necessary to define what libraries can do with the videotapes they own without infringing the copyrights they don't. If a particular use would be an infringement, permission can always be sought from the copyright owner.

A. In-classroom Use

In-classroom performance of a copyrighted videotape is permissible under the following conditions:

1. The performance must be by instructors (including guest lecturers) or by pupils; and
2. the performance is in connection with face-to-face teaching activities; and
3. the entire audience is involved in the teaching activity; and
4. the entire audience is in the same room or same general area;
5. the teaching activities are conducted by a non-profit education institution; and
6. the performance takes place in a classroom or similar place devoted to instruction, such as a school library, gym, auditorium or workshop;
7. the videotape is lawfully made; the person responsible had no reason to believe that the videotape was unlawfully made.

B. In-library Use in Public Libraries

1. Most performances of a videotape in a public room as part of an entertainment or cultural program, whether a fee is charged or not, would be infringing and a performance license is required from the copyright owner.
2. To the extent a videotape is used in an educational program conducted in a library's public room, the performance will not be infringing if the requirements for classroom use are met (See I.A.).
3. Libraries which allow groups to use or rent their public meeting rooms should, as part of their rental agreement, require the group to warrant that it will secure all necessary performance licenses and indemnify the library for any failure on their part to do so.
4. If patrons are allowed to view videotapes on library-owned equipment, they should be limited to private performances, i.e. one person, or no more than one family, at a time.

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5. User charges for private viewings should be nominal and directly related to the cost of maintenance of the videotape.
6. Even if a videotape is labelled "For Home Use Only," private viewing in the library should be considered to be authorized by the vendor's sale to the library with imputed knowledge of the library's intended use of the videotape.
7. Notices may be posted on videorecorders or players used in the library to educate and warn patrons about the existence of the copyright laws, such as: MANY VIDEOTAPED MATERIALS ARE PROTECTED BY COPYRIGHT. 17 U.S.C. § 101. UNAUTHORIZED COPYING MAY BE PROHIBITED BY LAW.

C. Loan of Videotapes

1. Videotapes labelled "For Home Use Only" may be loaned to patrons for their personal use. They should not knowingly be loaned to groups for public performances.
2. Copyright notice as it appears on the label of a videotape should not be obscured.
3. Nominal user fees may be charged.
4. If a patron inquires about a planned performance of a videotape, he or she should be informed that only private uses of it are lawful.
5. Videorecorders may be loaned to a patron without fear of liability even if the patron uses the recorder to infringe a copyright. However, it may be a good idea to post notices on equipment which may be used for copying (even if an additional machine would be required) to assist copyright owners in preventing unauthorized reproduction. (See I.B.7)

D. Duplication of Videotapes

1. Under limited circumstances libraries may dupe a videotape or a part thereof, but the rules of § 108 of the Copyright Revision Act of 1976 which librarians routinely utilize with respect to photocopying, apply to the reproduction.

II. COMPUTER SOFTWARE

A. Purchase Conditions Generally

Most computer software purports to be licensed rather than sold. Frequently the package containing the software is wrapped in clear plastic through which legends similar to the following appear:

> You should carefully read the following terms and conditions before opening this diskette package. Opening this diskette package indicates your acceptance of these terms and conditions. If you do not agree with them you should promptly return the package unopened and your money will be refunded.
>
> OR
>
> Read this agreement carefully. Use of this product constitutes your acceptance of the terms and conditions of this agreement.
>
> OR
>
> This program is licensed on the condition that you agree to the terms and conditions of this license agreement. If you do not agree to them, return the package with the diskette still sealed and your purchase price will be refunded. Opening this diskette package indicates your acceptance of these terms and conditions.

While there is at present no caselaw concerning the validity of such agreements (which are unilaterally imposed by producers), in the absence of authority to the contrary, one should assume that such licenses are in fact binding contracts. Therefore by opening and using the software the library or classroom may become contractually bound by the terms of the agreement wholly apart from the rights granted the copyright owner under the copyright laws.

Following such legends are the terms and conditions of the license agreement. The terms vary greatly between software producers and sometimes between programs produced by the same producer. Many explicitly prohibit rental or lending; some limit the program to use on one identified computer or to one user's personal use.

B. Avoiding License Restrictions

Loans of software may violate the standard license terms imposed by the copyright owner. To avoid the inconsistencies between sale to a library and the standard license restriction, libraries should note on their purchase orders the intended use of software meant to circulate. Such a legend should read:

PURCHASE IS ORDERED FOR LIBRARY CIRCULATION AND PATRON USE

Then, if the order is filled, the library is in a good position to argue that its terms, rather than the standard license restrictions, apply.

C. Loaning Software

1. Copyright notice placed on a software label should not be obscured.
2. License terms, if any, should be circulated with the software package.
3. An additional notice may be added by the library to assist copyright owners in preventing theft. It might read: SOFTWARE PROTECTED BY COPYRIGHT. 17 U.S.C. § 101. UNAUTHORIZED COPYING IS PROHIBITED BY LAW.
4. Libraries generally will not be liable for infringement committed by borrowers.

D. Archival Copies

1. Libraries may lawfully make one archival copy of a copyrighted program under the following conditions
   a) one copy is made;
   b) the archival copy is stored;
   c) if possession of the original ceases to be lawful, the archival copy must be destroyed or transferred along with the original program;
   d) copyright notice should appear on the copy.
2. The original may be kept for archival purposes and the "archival copy" circulated. Only one copy — either the original or the archival — may be used or circulated at any given time.
3. If the circulating copy is destroyed, another "archival" copy may be made.
4. If the circulating copy is stolen, the copyright owner should be consulted before circulating or using the "archival" copy.

E. In-library and In-classroom Use

1. License restrictions, if any, should be observed.
2. If only one program is owned under license, ordinarily it may only be used on one machine at a time.
3. Most licenses do not permit a single program to be loaded into a computer which can be accessed by several different terminals or into several computers for simultaneous use.
4. If the machine is capable of being used by a patron to make a copy of a program, a warning should be posted on the machine, such as: MANY COMPUTER PROGRAMS ARE PROTECTED BY COPYRIGHT. 17 U.S.C. § 101. UNAUTHORIZED COPYING MAY BE PROHIBITED BY LAW.

III. EXAMPLES

1. A high school English teacher wants to show a videotape of the film "The Grapes of Wrath" to her class. The videotape has a label which says "Home Use Only".

As long as the § 110 (1) requirements for the classroom exception apply, the class may watch the videotape.

2. Same situation as 1, but 4 classes are studying the book, may the videotape be shown in the school auditorium or gym?

Yes, as long as the auditorium and gym are actually used as classrooms for systematic instructional activities.

3. Several students miss the performance, may they watch the videotape at some other time in the school library?

Yes, if the library is actually used for systematic instructional activities the classroom exception applies. Most school libraries are probably used as such. If it is not, such a performance may be a fair use if the viewing is in a private place in the library.

4. May several students go to the public library and borrow the videotape to watch it at home?

Yes, the library may lend the videotape for in-home viewing by a student and a small group of friends.

5. May the student go to the public library and watch the videotape in a private room?

This normally would not be permitted because more than one person would be watching the videotape. However such a use probably would be fair under § 107 because of its relationship to the classroom activities.

6. May an elementary school teacher show a videotape of the film "Star Wars" to his or her class on the last day of school?

Because a classroom is a place where a substantial number of persons outside of a family and friends are gathered, performances in them are public. Assuming that this performance is for entertainment rather than with systematic instruction, the classroom exception would not apply. It is unlikely that such a public performance would be a fair use.

7. A book discussion group meets in a classroom at the high school. May they watch a videotape of "The Grapes of Wrath"?

No, the discussion group is not made up of class members enrolled in a non-profit institution, nor is it engaged in instructional activities, therefore the classroom exception would not apply. Any such performance would be an infringing public performance because it is a place where a group of persons larger than a family and its social acquaintances are gathered. Permission of the copyright owner should be sought.

8. Same as 7, but the group meets at a public library.

The performance may be infringing because the library is open to the public and the audience would be a group larger than a family and friends outside of a non-profit instructional program.

9. A patron asks if he can charge his friends admission to watch videotapes at his home.

The library's duty in this situation is merely to state that the videotape is subject to the copyright laws. In fact, as long as the patron shows the videotape at home to family or social acquaintances the performance would not be a public one, and therefore not infringing even if they share the cost of the videotape rental.

10. A patron asks if he can charge admission to the general public and show the videotape at a public place.

The duty is the same as in the previous situation; however, the proposed use is an infringement of copyright.

11. A librarian learns that a patron is borrowing videotapes and using them for public performances.

Again, there is a duty to notify the patron that the material is subject to the copyright laws. There is room for a variety of approaches to this situation, but there is no legal reason to treat videotapes differently from any other copyrighted materials which are capable of performance. While there is no clear duty to refuse to lend, there is a point at which a library's continued lending with actual knowledge of infringement could possibly result in liability for contributory infringement.

12. A book about the Apple IIe computer contains a diskette with a program for the computer. May the software be loaned with the book?

If the software is not subject to a license agreement it may be freely loaned like any other copyrighted work. If it is licensed, the agreement may or may not prohibit lending. A careful reading of the license is in order. If the license appears to prohibit any ordinary library uses the software producer should be contacted, and the agreement amended in writing. If this is not possible, the library should be able to return the package for a refund, as the seller, by selling to a library, may be on notice of ordinary library uses.

13. A math teacher uses one diskette to load a computer program into several terminals for use by students.

This use would violate copyright laws as well as most license agreements. It violates § 117 of the Copyright Act, which authorizes the making of *one* copy if necessary in order to use the program, because it creates copies of the program in several terminals. Further, many license agreements prohibit use of the software on more than one terminal at a time, as well as prohibiting networking or any system which enables more than one person to use the software at a time.

14. A math teacher puts a copy of "Visicalc" on reserve in the school library. The disk bears no copyright notice. May the library circulate it?

The disk ought to bear the copyright notice, but whether it is the library's legal duty to require one or to affix it is unclear. Individual library reserve policies may govern this situation — it's probably a good idea to require that the appropriate notices be affixed prior to putting the copy on reserve. Further, the lack of copyright notices may put the library on notice that this is a copy rather than the original program. If the original is retained by the teacher as an archival copy (i.e., not used) there is no problem. If not, then the reserve copy is an unauthorized copy and its use would violate the copyright laws and most license agreements. While the library might not be legally liable in this situation it would be wise to establish a policy for placing materials on reserve which prevents this.

15. May the library make an archival copy of the "Visicalc" program on its reserve shelf?

Usually yes. Section 117 permits the owner of the software to make or authorize the making of one archival copy. If the teacher who put the program on reserve has not made one, she or he may permit the library to do so. Remember, most license agreements and the copyright laws permit the making of *one* archival copy.

16. Same as 15, except the reserve copy is damaged. May the library make another copy (assuming it has the archival copy) for circulation?

Yes, the purpose of an archival copy is for use as a back-up in case of damage or destruction. The library may then make another archival copy to store while circulating the other.

17. Same as 16, except the reserve copy is stolen.

Perhaps. It is not clear whether the purpose of a back-up copy includes replacement in the event of theft but arguably it does. However, § 108 (c) permits reproduction of audiovisual works (which includes many computer programs) in the event of damage, loss, or theft *only* if a replacement may not be obtained at a fair price. Further, some license agreements require that archival copies be destroyed when possession (not ownership) of the original ceases. Therefore a replacement copy may need to be purchased. A safe course is to consult the software vendor.

18. When the teacher retrieves his or her copy of the program may the library retain the archival copy?

No. When possession of the original ceases, the archival copy must be transferred with the original or destroyed. If it is returned with the original, the teacher would not be permitted to make additional copies — he or she would have an original and the archival copy. Most license agreements contain similar provisions.

19. A librarian learns that a patron is copying copyrighted software on the library's public access computers.

There is a duty to notify the patron that the software is subject to the copyright laws. The computers should have notices similar to those on unsupervised photocopiers.

BEST COPY AVAILABLE

DATABASES AND THEIR OFFSPRING

By Alan R. Greengrass

When commercial online databases first appeared about 20 years ago, most users worked at "dumb" terminals over slow communication lines. A potent fear was that telephone line "noise" might disconnect the terminal from the central computer at any moment. Tempting as the thought might have been to capture the data locally, review it at leisure and manipulate it at will, the necessary technology was not available to the ordinary online searcher.

A lot has happened in 20 years — both to the databases themselves and to the hardware used for access. Powerful personal computers, sophisticated communications software and disk storage of every variety and size have made it easy to move data from a central computer to a personal file. As usual, the technology has run well ahead of the copyright laws and the requirements of individual subscription agreements.

The term "downloading" is commonly used to refer to the transfer of data (or software) from a remote computer to a local one or from a computer to a peripheral storage device. For the typical online user, downloading consists of transferring data from a central file through a modem into a personal computer memory, possibly manipulating the data or mixing it with other data, and then saving it on disk.

Commercial online databases all carry copyright notices that are displayed on the terminal screen, at least at the beginning of each search, as well as on each printout and downloaded file. NEXIS actually displays a separate copyright notice for each document. Furthermore, the subscription agreements signed with the online services all provide notice of copyright and some refer explicitly to the "fair use" provisions of the copyright law. All the agreements forbid reselling the data or engaging in any kind of commercial use without prior permission from the online vendor and/or the original publisher.

There is a difference of opinion as to whether or not electronic information poses unique copyright questions that require copyright law revisions. Some believe that the proliferation of electronic information networks on campus and within corporations, along with the growing acceptance of large personal computer libraries as a normal part of research conduct, means that the whole concept of copyright as now defined may not last into the next century.[1] Others believe the existing copyright law provides an adequate framework for computer-based text. What is needed, according to this view, is not new rules but flexible contractual arrangements between publishers and users that take into account the changing technology and new economic environment.[2]

Most online users are unaware of all the specific downloading rules.

The great copyright issues are not the chief concern of this article. Rather, it focuses more narrowly on some pragmatic questions related to the downloading of data from commercial databases by individual searchers. (It may be safely assumed that wherever "online" is referred to in the text, the same ideas apply to CD-ROM in at least equal measure.)

DOWNLOADING: PRINCIPLE AND PRACTICE

When an online user signs onto a service like NEXIS or DIALOG and selects a specific database, there are several parties to the transaction. The actual subscriber to the online service (library, university, corporation, etc.) has signed a subscription agreement with the database distributor containing specific terms and conditions. However, in most cases, it is a third party publisher who owns the copyright and who may impose further restrictions on use of the material. These supplemental conditions are usually referred to in the standard agreement and made available in print and/or online.

A review of the subscription agreements from some of the major online vendors in regard to downloading reveals many similarities, but also some interesting differences in emphasis and detail.

DIALOG's *Standard Service Agreement* (1/91) states:

> Under no circumstances may customer...copy or transmit data received from DIALOG Service in machine-readable form, or retain such data in machine-readable form other than temporarily for purposes of making a single human-readable copy thereof, except as may be expressly authorized in advance by the database supplier

> thereof. It is further agreed that data received from the DIALOG Service, regardless of form, is not to be transferred, sold or in any manner commercially exploited, except as part of the ordinary attorney-client or library-patron relationship as permitted by applicable copyright law....

The *Standard NEXIS Terms and Conditions* (1991) states:

> Subscriber may download and store, in machine-readable form, insubstantial portions of materials included in any individual file in the Services unless such downloading or storage is prohibited by MDC's then current Supplemental Terms for Specific Materials, is for use in a searchable, machine-readable database, or is not a "fair use" under the Copyright Act of 1976.

The *Dow Jones News/Retrieval User Agreement* (1991) states:

> Information received through the Service may be stored in memory, manipulated, analyzed, reformatted, printed and displayed for your personal, noncommercial use only. You agree not to reproduce, retransmit, disseminate, sell, distribute, publish, broadcast or circulate the information received through the Service to anyone, including but not limited to, others in the same company or organization, without the express prior written consent of Dow Jones.

Maxwell Online's *Terms and Conditions* (6/90) states:

> Databases may be used by customer solely for its own internal use. Reproduction, transmission or distribution of any such materials without the prior written consent of Maxwell Online and the proprietor of such materials is prohibited. Customer may download or otherwise retain data received through the Maxwell Online service in machine-readable form, as may be expressly authorized by the database supplier.

NEXIS and Dow Jones invite the user to download under certain circumstances. DIALOG starts out using the sternest language, saying "under no circumstances" may data be copied electronically, but then provides some exceptions. Maxwell is actually the most restrictive, apparently insisting that any downloading be expressly authorized by the data supplier.

Interestingly, some of the limitations on downloading that one would expect to see in these agreements are touched on rather lightly. Only DIALOG says the data may be retained just "temporarily," although some of the database publishers use such language in their supplemental terms. Only NEXIS says that only "insubstantial portions of materials included in any individual file" may be downloaded.

All the agreements suggest that the data are for personal use and are not to be retransmitted or sold. Only Dow Jones, however, explicitly states that the information received is not to be circulated to "others in the same company or organization" without prior permission. Only NEXIS explicitly forbids the use of downloaded data "in a searchable, machine-readable database."

DO THE USERS KNOW THE RULES?

A close textual analysis suggests many differences in the downloading procedures allowed on each system. Whether the major online vendors actually intend to convey different policies, or whether the differences are primarily the result of stylistic veriations in the legal boilerplate, is uncertain. What is certain is that most online users are unaware of all the specific downloading rules. In real life, users tend to operate on instinct and some general sense of downloading ethics.

Indeed, the subscription agreements with the small print describing downloading regulations are usually locked away with other important legal documents, completely inaccessible to the supervising librarian or manager, let alone to the end users themselves. If greater compliance with the rules is to be encouraged, far more will need to be done by both the institutional subscribers and the online systems. A starting point might be standardized signs near the terminals similar to those that have become common near photocopying machines. As networks proliferate, however, information about downloading limitations must appear prominently on the screens.[3]

In most cases, it is a third party publisher who owns the copyright.

What of the future? A few database providers have come to terms with downloading in new ways. CAS, the producer of *Chemical Abstracts*, has announced a policy that allows subscribing organizations to download up to 50,000 CAS records per year for reuse within the organization without further permission or fees.[4] COMTEX charges a monthly fee that includes copyright royalties and permits subscribers to incorporate the data into their own customized files. DowVision, the real-time news service from Dow Jones, uses a flexible fee schedule (based on the number of users) that includes permission to redistribute the data.[5]

While the need for copyright revision in relation to electronic information will continue to be debated, there seems to be a growing consensus that it is not realistic to expect any changes in the laws in the near future. As a result, electronic publishers and database subscribers are experimenting with a variety of contractual arrangements, including some pilot projects developed by the Copyright Clearance Center.[6] Large corporations such as AT&T are beginning to devote serious time and effort to copyright compliance.[7]

University libraries have been entering into agreements with publishers that make databases available on campus-wide networks, although usually with limitations on the kinds and numbers of users granted access. Some see serious risks in this approach, however, fearing the result will be to exclude people from the neighboring community and scholars from other institutions who have traditionally had free access to the library's resources. Less restrictive contracts are possible, of course, but would inevitably be more expensive for the university.[8]

Although solutions remain elusive, the issue of copyright compliance for electronic information has definitely turned ripe. Any thought that the problem will just go away if it is ignored can be laid to rest. The professional literature increasingly contains warnings and advice. A couple of headlines provide some of the flavor of the public debate: "The Dangers of Downloading; It's 1990 — Does Your Firm Know How To Purchase Information Services?"[9] and "Fair Use or High-Tech Plagiarism?". If nothing else, there is a definite awareness that a problem exists.[10]

In the long run, the buyers and sellers of information are bound to find a middle ground that provides copyright holders with fair compensation while providing information consumers with the necessary flexibility to take advantage of new technology. Both sides must be realistic, however, about the practical difficulties and costs of compliance. Ultimately, it will be the countless users on the networks who must be made aware of the rules and who will actually determine the degree of compliance.

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Alan R. Greengrass *is Manager, Product Development, for Index Operations at* The New York Times. *He is a former president of the American Society of Indexers and was a member of the Committee on Minimum Public Library Standards for New York State, 1987-88.*

I'M NOT MY BROTHER'S KEEPER: WHY LIBRARIES SHOULDN'T WORRY TOO MUCH ABOUT WHAT PATRONS DO WITH LIBRARY MATERIALS AT HOME

By Mary Brandt Jensen

Almost everything that libraries acquire for their collections and lend to patrons is protected by copyright. But copying has become remarkably easy with the advent of personal copiers, tape recorders, VCRs and microcomputers at prices affordable to many patrons. As a result many items, especially nonprint items, are accompanied by a dizzying array of dire warnings about the consequences of copyright infringement. In addition, the 1976 Copyright Act imposed some warning requirements on libraries and recent amendments have added more. And while there are as yet no published opinions in which a library has been held liable for copyright infringement, there are numerous reports of threatening calls and letters from publishers (especially of audiovisual works), and there have been even a few suits that have been settled. So how much should libraries worry about what patrons do with library materials after they leave the library, and what steps should libraries take to minimize their exposure to liability for copyright infringement?

There are two ways that a library could be held liable for copyright infringement. The first is direct infringement and the second is contributory infringement or vicarious liability for infringement committed by others. Direct infringement occurs when the library itself or one of its staff members commits the act that constitutes infringement. This happens most often when the library makes a copy of an item for a patron, but it can also occur if the library unlawfully distributes a copy to a patron or unlawfully conducts a public performance or display. Since this article is about potential liability for what patrons do after they leave the library, direct infringement by the library will not be discussed here.

Contributory infringement occurs when someone else commits the act that constitutes direct infringement, but the library is held vicariously liable for that person's actions. Contributory infringement cannot occur unless the patron's actions actually violate the law, so there is no contributory infringement if the patron's actions are exempted under fair use or other limitations in the Copyright Act. In addition to the existence of an infringing act on the part of the patron, there has to be a reason why the library should be held responsible for the patron's acts. There is no reason to hold the library responsible for the actions of the patron unless the library caused, assisted, encouraged or authorized the patron to do the infringing act or was in a position to control the use of the copyrighted work by the patron.

Since direct infringement by a patron is a necessary element of contributory infringement by a library, this article will examine some of the most common uses of library materials by patrons to determine whether or not they constitute infringement. Since, contrary to popular belief, there is no blanket exemption for personal use, each use must be examined separately.

Reproduction of copyrighted materials is the most common form of copyright infringement, and most patrons today own one or more devices capable of reproducing copyrighted works. A very large percentage of patrons own cassette tape recorders and many also own VCRs and microcomputers. Some even own personal copiers. Any copying of library materials using such devices is an infringement unless it fits within one of the limitations in the Copyright Act.

VIDEOTAPES

Patrons who check out videotapes are most likely to be guilty of infringement because they have copied the tape. The only exemption in the Copyright Act that might allow such copying is §107 on fair use. (Much of §108 does not apply to audiovisual works, and while the section provides some protection for libraries, that protection does not extend to patrons.) In determining whether copying of videotapes by a patron is fair use, the four factors listed in §107 must be considered.

The first factor is the purpose and character of the use. Most patron copying is probably noncommercial in the sense that the patron will not derive any financial gain directly from the copying, but it may be commercial in the sense that the patron may save himself some money that he would otherwise have spent buying or renting the videotape. If the use is considered to be noncommercial, that weighs in favor of a finding of fair use; if the purpose is considered to be commercial, it weighs against a finding of fair use. If the purpose of the copying is an educational or productive use (a use that contributes to the knowledge base of society or may lead to the creation of a new work), it will increase the likelihood of finding a fair use. On the other hand, while an unproductive purpose such as entertainment does not preclude a finding of fair use, it does not weigh in favor of a finding of fair use either.

The second factor is the nature and character of the work being used. If the videotape is a factual or documentary work, this factor may weigh in favor of finding fair use. But many videotapes loaned to patrons are of a fictional or entertainment nature, and that weighs against a finding of fair use.

The third factor is the amount and substantiality of the portion used in relation to the work as a whole. Most patrons copy the whole videotape, so this factor usually weighs strongly against a finding of fair use.

Videotape copying done by patrons could constitute direct infringement.

The fourth factor is the effect of the use upon the market for the work. Since patrons who copy videotapes borrowed from the library are unlikely to buy or rent those same tapes, such patron copying has a negative effect on the market for the work. This factor weighs against a finding of fair use. Since most of the factors weigh against a finding of fair use when most patrons copy videotapes borrowed from the library, much of the videotape copying done by patrons could constitute the sort of direct infringement necessary to support a claim of contributory infringement.

Despite this analysis, many people mistakenly believe that copying videotapes was declared to be a fair use by the Supreme Court in *Sony Corp. of America v. Universal City Studios*, 104 S. Ct. 774 (1984). This is simply not the case. While *Sony* did hold that taping television programs off the air for purposes of time shifting is a fair use, it did not hold that making such tapes and keeping them was a fair use. Nor did it find that copying a program that was already on tape was a fair use. In *Sony*, copying was necessary to view a free broadcast at a later time. Copying is not necessary to view a program already on tape at a later time. If the patron wished to view it again or later, he could borrow the tape from the library again. All of these distinguishing factors make it unlikely that the Supreme Court would hold that copying an entire videotape borrowed from a library is fair use.

SOUND RECORDINGS

Sound recordings were not protected by Federal statutory copyright until 1972. Thus patrons may make copies of sound recordings released prior to 1972 without being liable for Federal statutory copyright infringement. And since there is no infringement under Federal law, libraries cannot be guilty of contributory infringement under Federal law for patron copying of pre-1972 sound recordings. Such copying may, however, be prohibited by state laws, which are beyond the scope of this article.

Nothing in the legislative history of the 1976 Act indicates that home audio taping is fair use.

Sound recordings produced after February 15, 1972, however, enjoy a limited form of protection under the Copyright Act. Whether or not that protection prohibits home taping of sound recordings is a matter open to debate. There are sections in the legislative history that indicate that at least some of the legislators who voted for the 1971 amendment believed that home audio taping was fair use and that the amendment would not change the fair use nature of such copying. But the statement in the legislative history is far from clear, and noted scholars disagree with the assumption that home audio taping is fair use. Furthermore, there is nothing in the legislative history of the 1976 Act that indicates that home audio taping is fair use or that home taping of sound recordings should be treated any differently than copying of other works.

Assuming there is no special fair use status for home taping of sound recording, the same four factors should be applied that have been applied to videotapes. Except for the fact that sound recordings are usually collective works and patrons may want to copy only one or two selections from the collective work, the analysis is the same. But the amount copied is a very important factor since it also has a strong correlation to the effect of the copying on the market value of the work as a whole. If only one or two selections are copied, the copying is a lot less likely to displace a future sale. So patron copying of one or two selections from a collective work of sound recordings is much more likely to be a fair use than patron copying of entire sound recordings.

SOFTWARE

Many libraries have begun to build collections of microcomputers programs that they lend to their patrons. While libraries are inclined to treat all materials on computer disks the same, the Copyright Act makes a distinction between computer programs and other works stored on computer disks. §117 gives the owner of a copy of a computer program the right to make a backup copy of the program. Many people mis-

takenly believe that this action gives the patron a right to copy anything on a computer disk that he/she borrows from the library. It does not. First of all, the section only gives the backup right to the owner of the copy of the program, and the patron does not *own* the copy. Secondly, this is a backup right only, which ceases to exist when lawful possession ceases (i.e., when the program is due back at the library). Finally, the section applies only to computer programs and not to other material stored on computer disks. Thus, in order to avoid copyright infringement, the patron must find some other limitation that permits the copying.

As explained above, §108 does not give patrons any rights. They must rely on §107 — fair use. The problems with relying on fair use for computer programs are the same as those for videotapes. While the use may be noncommercial, most of the other factors will weigh against the patron most of the time. When a program is factual in nature, the nature of the work may weigh in favor of a finding of fair use. But many programs are entertainment works, and many more are considered to be unpublished works because their source code is not released. In such cases, the nature of the work weighs against a finding of fair use. As with videotapes, few patrons want to copy only part of a program. They want it all, and that weighs against finding fair use. Finally when patrons borrow and copy programs, they are much less likely to buy the program than if they just borrow it without copying. So the market factor also weighs against finding a fair use. Thus, most of the factors weigh against a finding of fair use when patrons copy programs borrowed from the library.

Most shareware is still protected by copyright.

Many people point out that while some programs circulated by libraries are copyrighted, many others are not and can be freely copied by patrons. This is not strictly true. Most of the software circulated by libraries was created after January 1, 1978, and under the 1976 Act copyright attaches as soon as the program is fixed on a disk even if it contains no notice of copyright. Between 1978 and March 1, 1989, a program could lose its copyright and go into the public domain if many copies were distributed without a copyright notice; since March 1, 1989, the notice is no longer required. In fact, most of these programs are copyrighted programs distributed under shareware licenses. Such software is still protected by copyright, and any patron who makes a copy and does not strictly comply with the terms of the shareware license could be guilty of copyright infringement.

LITERARY WORKS

Literary works is a term used by the Copyright Act to cover all works that do not fit into the following categories: musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; audiovisual works; sound recordings; and architectural works. It includes books and other literary works no matter in what medium they are stored, including paper, magnetic tape, and computer disks. Only §107 on fair use can give a patron the right to copy such works. Again, the four factors to be considered are the same as those considered for audiovisual works. Will the patron gain financially from the copying? Is the copying for educational or other productive purposes? Is the work a factual or an entertainment work? Is it an unpublished work? Did the patron copy the entire work or only a small part of it? And, perhaps more important, will the copying cause the copyright holder to lose any potential sales or other income from the work?

The difference between literary works and other types of works is that patrons frequently make copies of small parts of literary works and the copying is, therefore, less likely to cause the copyright holder financial harm. It is also more likely that the uses of literary works will be uses of factual works for educational or productive purposes. So several of the factors likely to weigh against a finding of fair use for audiovisual works and sound recordings are more likely to weigh in favor of finding a fair use with literary works. While patron copying of literary works is less likely to be found to be infringing than patron copying of audiovisual works and sound recordings, it can still be found to be infringing, especially if the whole work is copied, as is usually the case with computer programs, which also fall in the category of literary works.

PERFORMANCE AND DISPLAY

Although reproduction is the most common way in which patrons violate copyright laws, they may also infringe copyrights by conducting public displays and performances of library materials. This usually occurs with videotapes and sound recordings, but it can occur with other types of works as well. The Copyright Act gives the copyright owner the exclusive right to perform or display his/her works publicly or to authorize public performances and displays of his work.

The definition of "performance" is very broad, covering everything from reading a work aloud to receiving a television or radio broadcast signal. It includes playing a sound recording or a videotape. The definition of display is also very broad, covering any showing of a copy of a work either directly or by means of a film, slide,

television image or any other device or process. It also includes the projection or display of a work on a computer screen. Performances or displays are public if they are conducted at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances are gathered.

Most libraries are open to the public, so performances and displays of copyrighted works by patrons in rooms of the library are public and could provide a basis for infringement. Meetings of social clubs, public service clubs and other groups are places where a substantial number of people outside the normal circle of a family and its social acquaintances are gathered. Thus playing a sound recording or a videotape checked out from the library at such a meeting could also result in charges of infringement.

If, indeed, so much patron copying of library materials is likely to be infringing, why is this article entitled "I'm Not My Brother's Keeper"? All evidence to date leads to the conclusion that, if a library follows a few simple precautions, there is much in the Copyright Act and case law that will exempt a library from liability for contributory infringement.

Lending of works is specifically authorized by the copyright law.

The most important statutory protection is found in §109 of the Copyright Act, also known as the first sale doctrine, which gives the owner of a copy of a copyrighted work the right to sell or otherwise dispose of possession of the copy of the copyright work. For most works, the right to dispose of possession of the work includes the right to lend the copy of the work to someone else. The right to lend is limited in the case of sound recordings and computer programs, but §109 explicitly preserves the right of nonprofit libraries to lend sound recordings and computer programs to patrons. Thus, the actual lending of works is specifically authorized by the copyright law and cannot by itself cause a library to be liable for contributory infringement. While §109 explicitly preserves the right of nonprofit libraries to lend all forms of copyrighted works, it does require libraries to place a very specific copyright warning notice on all software that they lends to patrons. The text of the required notice is printed at 19 CFR Section 133.1. Circulation of software without this notice violates §109 and is a direct infringement of copyright by the library under §501 even if the patron makes no infringing copies.

§108(f)(1) provides additional statutory protection. It states:

> nothing in this section shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises, Provided, That such equipment displays a notice that the making of a copy may be subject to copyright law.

If a library cannot be held liable for the copies a patron makes on its own machines in the library, then surely it cannot be held liable for copies a patron makes in his own home where the library has far less control than it does over the unsupervised machines in its own buildings. The same reasoning applies to copies made with equipment, such as VCRs, that many libraries also lend to their patrons. So long as the notices are attached to the equipment when it is lent to the patron, the library should not be held liable for what the patron does with it when not under the library's supervision.

Another important factor is that in order to be held liable for contributory infringement under the case law, the library must have done something to encourage or assist the patron in committing the infringing act. If all the library does is provide the patron with the materials that the patron could use for a wide variety of legal purposes, the library has done nothing to encourage infringement. Most cases in which contributory infringement has been found contain some action on the part of the defendant that actually did or could be interpreted as encouraging or condoning direct infringement. The fact that libraries do not profit financially from lending materials to patrons makes it even more likely that a court would require proof of some sort of active encouragement of infringement in order to hold a library liable for contributory infringement.

But the fact that the law contains a number of provisions that make it unlikely that a library would be held liable for contributory infringement does not mean that libraries should do nothing to discourage infringement by patrons. In order to minimize the risk of liability for contributory infringement, libraries should consider the following steps:

1. Place the required copyright notice on all computer programs before circulating them to patrons.
2. Take care not to remove or obstruct notices and warnings placed on materials by the copyright holder or vendor. Removing or obstructing notices might be considered by some courts to be active encouragement of infringement.
3. Place warning notices, similar to those placed on copying machines, on any equipment that is lent to patrons.
4. Refuse to lend materials to a patron when they have

certain knowledge that the patron intends to copy the materials or use the materials for a public performance or display.

5. Avoid any advertisements or statements by employees that state or imply that a patron can copy materials borrowed from the library or use them in public performances or displays.
6. Consider placing copyright warning notices on all nonprint items circulated to patrons.

Mary Brandt Jensen *is Director of the Law Library and Associate Professor of Law at the University of South Dakota. She is the author of a number of articles on intellectual property and was chair of the American Association of Law Libraries Copyright Committee in 1989-90.*

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THE FEDERAL GOVERNMENT'S ELECTRONIC DATA FILES: QUESTIONS OF ACCESS RIGHTS AND COST

By Susan L. Dow

This article seeks to provide a brief introduction to Federal government policies regarding the electronic collection and dissemination of information by Federal agencies and their effects on libraries.

Six documents together define the Federal government's current information policy: Title 44 of the *United States Code*, the Freedom of Information Act, the Privacy Act, the Copyright Act of 1976, the Paperwork Reduction Act of 1980, and U.S. Office of Management and Budget Circular A-130. They form the basis for decisions concerning the collection and dissemination of information. In order to determine why some may assert that the government maintains proprietary rights over the information it collects and disseminates, at taxpayer's expense, it is necessary to briefly describe the main provisions of each of these documents.

Title 44 of the *United States Code*[1] contains the laws of the United States relating to the production and procurement of printing and binding by Federal agencies, and the distribution and sale of public documents, including the activities of the United States Government Printing Office and its Depository Library Program. The Depository Library Program was established as part of the Printing Act of 1895. Approximately 1,400 libraries participate in this program, which allows participants to receive copies of government publications at no charge. Libraries agree to provide free public access to materials received through the Depository Library Program.[2]

The rapid development by Federal agencies of electronically formatted products causes librarians concern. §1902 of Title 44 of the *United States Code*, mandating that government publications be sent to depository libraries, was last revised in 1968, prior to large-scale growth in this format of publication. While the Government Printing Office has included CD-ROMs and computer diskettes in the Depository Library Program, what constitutes a "government publication" under §1902 is still subject to interpretation.

The Freedom of Information Act (FOIA) became law in 1966.[3] This landmark piece of legislation provides a mechanism for making the records of government agencies more accessible. Individuals can request copies of records held by Federal agencies. If an agency refuses to release a record, it must justify its decision; if the individual involved is not satisfied, he or she may seek review in court. The original legislation and its later revisions in 1986 mandate that Federal agencies publish their fee schedules in the *Federal Register*. The 1966 Act required that the fees established for receiving information be limited to "reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication."[4] Later amendments to the Freedom of Information Act establish categories of information requestors. If materials are requested for commercial use, the requestor is assessed charges for document search, duplication and review. When an educational, noncommercial scientific institution or a representative of the news media requests materials for noncommercial use, the fee is limited to document duplication costs, after the first one hundred pages of duplication.

The law further states that documents will be furnished without any charge, or at a reduced charge, if the material released is in the public interest and not to be primarily used for commercial purposes. The FOIA fee schedules do not supersede fee structures that may be established under legislatively enacted statutes. This exemption provides Congress with the ability to determine price structures for specific paper or electronically formatted products.

Whether or not the Freedom of Information Act was intended to cover materials in electronic format has been the subject of litigation. Several court cases may help to illustrate how differently the Freedom of Information Act may be applied.

In the case of SDC Development Corp. v. Mathews,[5] the U.S. Court of Appeals decided that the MEDLARS[6] tapes, produced by the National Library of Medicine, were not agency records under the FOIA and therefore not subject to the FOIA fee schedule. Basing its decision on the legislative history of the FOIA, the Court concluded that the intent of Congress was to provide the American people with access to information about the internal workings of their government, meaning the structure, operation and decision-making procedure, and not "work product" like the MEDLARS files. SDC could purchase the MEDLARS tape for $50,000 a year, but was not entitled to the tapes for only the cost of duplication.

The same Court, in 1979, in the case of Long v. United States Internal Revenue Service,[7] decided that the legislative history of the 1974 amendment to the FOIA had dealt with the question of computer records. The FOIA's applicability to computer tapes was the

same as to other records. Some feel that the decision in SDC v. Mathews was not based on the Court's interpretation that computer records were not agency records as intended by the FOIA. Rather, they feel that the decision was based on the fact that Congress had legislated a separate fee structure for the MEDLARS tape. The content of the tapes were the determining factor, not the format in which the information was presented.

Because of the controversy surrounding application of the FOIA to electronic records, some Congressmen have favored amending the Freedom of Information Act to specifically include references to electronically formatted materials.[8] Others feel that the Act does not need to be amended.[9] It may be a better policy, they contend, to let the courts decide the applicability of the FOIA to electronically formatted products when disputes arise.

The Privacy Act was passed in 1974.[10] The Act was created to protect individuals against unwarranted access to confidential records. The advent of computer technology to process and store information led to concern about the security of personal information housed in government databases. As a result of the Privacy Act, individuals can view their personal files maintained by Federal agencies. People who believe they have been harmed because a Federal agency did not comply with provisions of the Privacy Act can institute action in a Federal court. Most federally promulgated information policy documents include references to the Privacy Act.

Let the courts decide the applicability of the FOIA to electronically formatted products.

The Copyright Act of 1976[11] was a major recodification of United States copyright legislation. Perhaps the most well-known provision of Title 17 is §105, which states:

> "Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise."[12]

The statutory language is clear. No work of the United States Government can be copyrighted. Just what is a work is defined by §101 of the same Act.

> "A 'work of the United States Government' is a work prepared by an officer or employee of the United States Government as part of that person's official duties."[13]

Work produced by an employee as part of his/her official duties is not subject to copyright. It is a generally accepted practice that work completed by individuals under Federal grants can be copyrighted, even though the funding for the grant may have been through public revenues.

The main purposes of the Paperwork Reduction Act of 1980 (PRA) and its reauthorization act in 1986[14] were to minimize the paperwork burden for individuals, small businesses, and state and local governments; to minimize the cost to the Federal government of collecting, maintaining, using and disseminating information; and to coordinate and promote the uniformity of Federal information policies and practices. Amendments to the PRA passed in 1986 embodied the concept of dissemination as part of the life cycle of the information product.

With the passage of the PRA, the Office of Management and Budget (OMB), within the Executive Office of the President, was designated as the coordinating agency for implementing Federal government information collected by Federal agencies to determine if it is a necessary and proper responsibility of the agency. For example, it had some questions on the 1990 Census long-form questionnaire deleted, believing that the same information could be found in other sources.

Circular A-130, issued by OMB on December 12, 1985,[15] under the authority of the PRA, provides a general policy framework for management of Federal information resources. Realizing that Federal agencies were using electronic media to collect and disseminate information, it included computerized databases and magnetic tapes in its definition of "information."

Several provisions directly apply to this. OMB mandates that Federal agencies, defined as "any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government, or any independent regulatory agency,"[16] including the Office of Management and Budget and the Office of Administration within the Executive Office of the President, review their information collection procedures to determine the most cost-effective methods of collection and dissemination. Agencies should first look to the private sector to provide commercial goods and services and should not "duplicate similar products or services that are or would otherwise be provided by other government or private sector organizations."[17]

Federal agencies have the responsibility to disclose public information and the public's rights to know should be protected. However, the agency should disseminate information by "placing maximum feasible

reliance on the private sector for the dissemination of the products and services, in accordance with OMB Circular No. A-76."[18] Circular A-130 also states that agencies should "acquire off-the-shelf software from commercial sources, unless the cost effectiveness of developing custom software is clear and has been documented."[19]

OMB Circular A-76, entitled, "Performance of Commercial Activities," was first issued in 1966. The principle underlying this circular is that the Federal government should rely on its citizens to supply the products and services needed by the government. The circular describes the steps that Federal agencies should take before initiating services.

These six Federal information policy documents provide the basis under which Federal agencies operate when collecting and disseminating information. There must be a clear need for collecting the information. If a new collection system is to be implemented, such as an electronic database, the agency must first look to the private sector for development of the system. When the agency decides that the public has a right to access the information, and decides to implement a electronic format for dissemination, the agency should use commercial software to run the system, especially if it is more cost effective to do so.

PROPRIETARY ACTIONS

Copyright law does assert that works created by government employees as part of their official duties cannot be copyrighted. The employee is paid by the taxpayer and therefore the work product belongs in the public domain. This law is much easier to apply when the end result is in a tangible medium. Electronically formatted products may be a combination of creative endeavor on the part of the designer, but may also include privately developed software.

> "The practical difficulties of recreating and redistributing electronic data means [sic] that agencies can have a greater ability to control the way in which government data — which is in the public domain — can be obtained, used and redistributed by those outside government."[20]

Circular A-130 has placed requirements on the development of electronic information systems and on the electronic dissemination of information that have resulted in Federal agencies acquiring the attributes of a copyright holder. Federal agencies negotiate contracts with private sector vendors not only for the initial development of an information system, but also for public dissemination of the information. In many cases, an agency exercises a form of monopoly on the information that it collects at taxpayer expense.

OMB clearly recognizes that information has a value. It is a commodity that can be marketed by the private sector, where a vendor may obtain revenues by developing an information system and even more by disseminating that information.

> "The expansion of market rationality as an integral part of the modernization of western industrial society has made it more and more probable that information will be considered not only as a value, a potential to satisfy different information needs, but also has a carrier of exchange value in terms of money."[21]

It is no surprise that placing maximum feasible reliance on the private sector for the dissemination of Federal government information is an idea strongly supported by the information industry. Its members feel, and Federal government policy at this time seems to suggest, that this approach is of most benefit to the American public. However, this policy has been hotly debated, leading one author to comment:

> "The OMB approach focuses on the impact the federal government information policy has on the private sector without sufficient regard for the information policy's impact on public access policies defined by Congress in the FOIA and the DLA."[22]

The Federal government also acts as a copyright holder when it makes decisions concerning what information will be accessible to the public. Recent automation decisions by Federal agencies may help to further illustrate how Federal agencies interpret their responsibilities under the laws governing Federal information policy.

In many cases, an agency exercises a form of monopoly on the information that it collects at taxpayer expense.

The Federal Maritime Commission, established in 1961, is responsible for regulating the waterborne foreign and domestic offshore commerce of the United States. Common carriers file their tariff rates with the Commission, which provides access to them in its public reference room in Washington and also in response to FOIA requests. Filing of these rates has been done in paper.

In 1983, the Commission began to develop plans for a computerized filing method. Eliminating a paperwork burden for shippers and for the agency would be consistent with the Paperwork Reduction Act. The Auto-

mated Tariff Filing and Information System, referred to as ATFI, would allow the public online access to tariff rates. Computer tapes would also be available for the cost of dissemination, consistent with provisions of the Freedom of Information Act. The Commission would use this system to answer public requests for information.

The information industry opposed this system, arguing that the government would be competing with a private vendor who was already providing online access to tariff rates. OMB Circular A-130 states that the government should not initiate a service already performed by the commercial sector.

The House Subcommittee on Merchants Marine and Fisheries placed a rider in the Federal Maritime Commission's 1990 reauthorization bill[23] that limits public access to ATFI. Limits were placed on the amount of time a remote user can access the database. The database is available on magnetic tape, in bulk, useless to anyone but a commercial vendor who has the ability to manipulate the data. The government's charges for providing the tape are consistent with the Freedom of Information Act. The House subcommittee exercised a proprietary right when it restricted public access to information collected at taxpayer expense.

The Securities and Exchange Commission (SEC) is responsible for regulating the securities markets in the United States. It maintains corporate disclosure information, including prospectuses and registrations, and is now developing a database, called Electronic Data Gathering, Analysis and Retrieval (EDGAR), that will provide an electronic means for filing this information.

EDGAR is also to be used by the public; however, as is the case with AFTI, the format of the information makes it useless to anyone but an information vendor. A vendor can recoup the cost of tape processing by charging high user fees for accessing the information. According to one source, taxpayers will have spent more than $50 million to create EDGAR and will still have to pay a vendor for access to the system.

> "Although the taxpayers will have spent more than $50 million to develop this system, they will never own a copy of the database, the computers on which the data is stored, or the software that is used to search it. The entire EDGAR system is designed to provide, at taxpayer expense, a machine-readable version of SEC disclosure filings to large users of the data, including vendors such as Mead Data Central's LEXIS/NEXIS service."[24]

Robert Gellman, Staff Director of the Subcommittee on Government Information, Justice and Agriculture of the House Committee on Government Operations, noted in an 1988 article that "Neither the Commission nor its contractor will be able to exert any form of copyright or ownership over publicly available EDGAR data...Because any lawful recipient of the data can disseminate it for a fee or without a fee, there should be a completely open market in EDGAR data."[25]

The question in both cases, and others like them, is open market for whom: the information industry, which will charge at rates higher than the costs of acquiring the tapes, or the public, which paid for the creation of the system?

IMPLICATIONS FOR LIBRARIES

Access to Electronic Products

Library administrators, already coping with budget reductions, are forced to do more with less. The resources needed to maintain comprehensive book and serial collections often compete with the resources needed to provide library patrons with the best that technology has to offer in the form of customized database searches and electronic information retrieval.

Most large academic and other research libraries subscribe to at least one commercial vendor's online database system. Typically, the vendor's charges combine a fixed subscription fee and variable charges based on connect time, quantity of data searched and retrieved, and royalties. The fixed fees can be budgeted on a yearly basis, but it is more difficult for a library to predict what search charges, royalty payments and telecommunications charges will be incurred. Unless a library budgets a specific amount of money for online searching, it can be a challenging task to keep expenses at a minimum. Libraries have traditionally handled this task by budgeting the subscription fee and passing the unknown costs on to the patron.

Libraries have had a history of charging patrons for services that are user specific. The first patron charge for library services was for interlibrary loan. Since online searching tends to be tailored to the requests of the patron and usually no two searches are alike, most libraries charge patrons a fee for accessing remote databases (unless, of course, the licensing arrangement with the vendor precludes such fees).

> "The pulse to innovate, coming at the same time that academic libraries were experiencing a financial downturn after the flush 1960s, lead to explorations of alternative financing arrangements and, of course, fees for online searching."[26]

It appears that library clientele, especially in the academic setting, have been willing to pay modest charges for access to databases. They appreciate the currency and ease of access to the information. When a CD-ROM version of a product is available, it is possible to provide ease of access to the information. Although the information obtained may not be as current as that

found in an online database, the library will usually absorb the costs of acquiring and making the CD-ROM product available.

Government-Produced Databases

Access to information is essential in a democracy. If government agencies use electronic methods to collect and disseminate information, and do not provide meaningful access to that information, the American public cannot make knowledgeable decisions concerning their government and may no longer have access to current statistical information or to important studies.

OMB Circular A-25,[27] issued by the U.S. Bureau of the Budget in 1959 and later revised by the U.S. Office of Management and Budget, provides Federal agencies with guidance concerning the establishment of user fees. The circular expresses the Federal government's belief that it should not compete with the private sector. It states that a reasonable charge should be assessed to a recipient who receives a special benefit from a measurable amount of government service or property. If a special benefit is derived, the government should recover the full cost of rendering the service. If the service rendered will benefit the American public as a whole, then no charges should be assessed for the service.

Of greatest concern to libraries will be those electronically formatted products that are available only through commercial vendors.

Paying for Federal government information is not a new concept. Libraries pay for publications purchased from the United States Government Printing Office.[28] Congress has passed laws that allow Federal government agencies to charge for specific types of products. Charges for access to information may be included as part of Federal agency appropriation bills. Many of the publications issued by the Library of Congress are considered self-sustaining. The revenue generated from the sale of the product must cover the costs of producing the product. The National Technical Information Service sells publications at prices that far exceed the cost of production. Nothing prevents someone from purchasing a publication issued by a Federal agency and in the public domain, enhancing the publication, repackaging it and selling the publication for a profit.

Electronically formatted products require more initial investment on the part of the government. Federal agencies need appropriation approval and OMB's blessing that the information to be collected is necessary to the functioning of the agency. They have to place "maximum feasible reliance on the public sector."[29]

It may be useful to summarize what a library faces when it seeks to acquire a federally produced electronic product. If it requests the information under the FOIA (and will use it for noncommercial purposes), it will probably be charged the cost of copying and disseminating it. If the library seeks to acquire a product for which the price has been determined by Congress, that price may reflect production costs as well as dissemination costs, especially if the product is intended to be self-sustaining. Perhaps of greatest concern to libraries will be those electronically formatted products that are available only through commercial vendors. The library will not own the information product and will have to pay the vendor's rate for accessing the information.

DEPOSITORY LIBRARY PROGRAM

Many librarians send their patrons to the nearest U.S. Government Printing Office depository library[30] for free access to printed Federal government publications, if the library is unable to acquire a Federal publication. It is a requirement of those participating in the program to provide free access to publications. This requirement creates a "safety net" that allows anyone, rich or poor, to find out about the activities of their government.

The concept of a "safety net" is weakened as Federal agencies store more and more information in computer databases that are not accessible to the public or to depository libraries. Access may be restricted for various reasons, including cost.

> "This historic shift, from a policy of pricing information according to the public's willingness to pay, and the weakening of the Depository Library Program has disastrous consequences for society. It represents a rejection of the principle of universal access to Federal information, and it will lead to inefficient dissemination of information that has important social, economic and scientific value."[31]

The Government Printing Office has been distributing CD-ROMs and diskettes through the Depository Library Program, even though some may argue that electronic media are outside the scope of the Program. With the distribution of these products have come questions concerning the acquisition of software to run the products. If the agency does not supply its own software, or the software is not in the public domain, then the depository library will have to purchase commer-

cial software. Depository libraries have been willing to fund the acquisition of hardware to run these products and have allocated staff time for user training.

Federal agencies store more and more information in computer databases that are not accessible to the public.

While questions concerning CD-ROMs and diskettes are being resolved, depository libraries' access to online databases and electronic bulletin boards is in its infancy. The GPO has initiated several pilot projects to test the feasibility of providing depository libraries with access to online information and is participating as a test site for the Project Hermes bulletin board. Depository libraries are able to access the text of recent United States Supreme Court decisions by dialing into the Project Hermes system. The library must pay for the telecommunications charges and must, of course, own the appropriate hardware.

PENDING LEGISLATION

Several pieces of legislation are pending in the United States Congress that would provide increased access to Federal government electronic information.

H.R. 2772, the GPO Wide Information Network for Data Online (WINDO) was introduced by Representative Charlie Rose. The purpose of this legislation is to create within the Government Printing Office, a single access point for Federal government electronic databases that contain public information. The major library associations support this bill as potentially providing greater access.

The improvement of Information Access Act, H.R. 3459, was introduced by Representative Owens in an attempt to require Federal agencies to store information in standardized formats. A provision of the bill also mandates that the cost of electronic formats be limited to the cost of dissemination.

CONCLUSION

Providing access to electronic information through the Depository Library Program is one of the greatest challenges that the United States Government Printing Office and Depository Libraries will be involved in over the next several years. If all the players in the game: the Federal agencies, the library community and the information industry, cannot come to a compromise in this area, then it is the public who suffers when electronic information falls out of the "safety net."

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Susan L. Dow *is Documents Librarian at the Charles B. Sears Law Library at the State University of New York in Buffalo. She is currently chair of the Government Documents Special Interest Section of the American Association of Law Libraries. She has served as Chair of the New York State Librarian's Advisory Council on Federal Depository Library Service and as Chair of the New York Library Association Government Documents Roundtable. Her interests extend to state government information policy, and she is author of* State Documents Checklists, A Historical Bibliography, *published in 1990.*

THE INTERNATIONAL SCENE

*By Joseph S. Alen**

The internationalization of information demand and fulfillment is an important element in the information technology revolution. The ability to access vast quantities of information — from both scientifically prolific regions as well as the remotest corners of the globe — has helped to fuel integration of the world's economies, cultures and research and development activities. For example, surveys by the Copyright Clearance Center show that, on average, 20-30 percent of copying by U.S. corporations is from non-U.S. materials. The means of access are equally diverse, whether a journal article faxed from the British Library Document Supply Center or a Max Planck Institute treatise downloaded via the Internet.

This increasingly international character of the flow of information poses an important question for the U.S. librarian: what are the copyright implications of these transnational activities? From that, flows a second important question: what are the compliance mechanisms available to U.S. librarians?

U.S. COPYRIGHT LAW GOVERNS

For the most part, and subject to a few important exceptions, the mere fact that copyrighted works migrate back and forth across the U.S. border does not enlarge or diminish a U.S. librarian's actions or responsibilities under any copyright laws. This is so principally because copyright laws are territorial, i.e., they apply only to actions and individuals within the borders of the country in which they are enacted. Thus, an act of copying in the U.S., for example, is or is not an infringement of copyright depending upon U.S. law. In general, it matters little that the work copied may have been published in France, or if a French national residing in the U.S. made the copy. It is U.S. copyright law that governs activities occurring in the U.S., and conversely French copyright law that determines infringement by a U.S. national in France.

THE EFFECT OF U.S. ADHERENCE TO THE BERNE CONVENTION

Additionally, U.S. adherence to the Berne Convention in 1989 requires U.S. copyright law to grant to foreign works and foreign rightsholders no worse treatment than it does to U.S. works and U.S. rightsholders. This requirement in the Berne Convention is known as the principle of "national treatment," and it applies to all 77 signatories of that treaty.

The Berne Convention also requires of its signatories certain minimum standards and conditions for their copyright laws. For example, Article 5 (2) of Berne requires that "The enjoyment and exercise of these rights shall not be subject to any formality....". Consequently, in order to adhere to Berne, the U.S. had to amend its copyright law in 1988 to remove a requirement that a copyright notice was a necessary condition for a work in order to enjoy copyright protection in the U.S. Since that amendment, therefore, one can no longer rely on the appearance of a printed copyright notice in a work for purposes of determining the copyright status of that work. These minimum standards and conditions also lead to substantial similarity and homogeneity of national copyright laws.

Copyright laws are territorial.

However, in a complex world, perfect harmony is not possible. Different interpretations by different legal systems produce different results. For example, both U.S. and German copyright laws extend protection to computer software and both nations' laws require originality as a necessary element for that protection. However, U.S. courts require a very low threshold of originality, while German courts, conversely, demand an extremely high degree of originality in order to grant protection. So despite "national treatment," a computer program written in the U.S. might not be eligible for protection in Germany. Such legal nuances, of course can have a serious effect on the availability of works from country to country as producers engage in the risk-reward calculations.

Also, although the basic principle is that one looks to one's domestic copyright law to determine whether an act regarding foreign works is or is not copyright infringement, there may be certain special provisions that apply under certain circumstances. For example, §602 of the U.S. copyright statute makes it an infringement of the distribution right within copyright to

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import a copy of a copyrighted work into the U.S. without the copyright owner's consent, unless certain circumstances pertain (e.g., private use of the importer). Thus, although reference to U.S. copyright law will provide sufficient guidance for action with regard to U.S. uses of foreign works, advice of counsel should be sought if systematic, international document supply or similar activities are considered. This particular right under copyright law is not replicated in any significant number of foreign countries.

COUNTRIES NOT INCLUDED IN THE BERNE CONVENTION

Finally, what are the consequences of using a work from a country that is not a Berne Convention signatory? The two major countries that are not Berne members are the Peoples Republic of China and the republics of the former U.S.S.R. Both the PRC and the CIS have stated that they will join the Berne Convention. As to other non-Berne countries, there are certain bilateral treaties and multilateral agreements with some of those countries that provide somewhat similar results. The relatively small number of non-Berne adhering countries makes this a *de minimis* issue for most U.S. librarians.

Photocopying is perhaps the largest copyright-sensitive use of foreign works by librarians.

COPYRIGHT COMPLIANCE THROUGH COLLECTIVE LICENSING

If then, we look to U.S. law on copyright questions, what are the available mechanisms that will enable a conscientious librarian to comply? In order to limit reasonably the response to this question, this article will focus principally on the reproduction right within copyright and limit the activities to photocopying that, under U.S. and most national copyright laws, is governed by the reproduction rights. Photocopying is perhaps the largest copyright-sensitive use of foreign works by librarians. Use of online services or other commercial databases are typically governed by library contracts with suppliers, and consequently it is largely contract, not copyright, law that applies. Internal-use electronic databases, which are often created by scanning previously published print materials, present an extremely broad range of complex issues. Licensing systems for such database uses are still in the earliest stages of development, and thus beyond the scope of this article.**

At the outset, it must be noted that copyright laws, like all laws, require reasonable and effective mechanisms for implementation. Without effective implementation, they will not be observed and will not fulfill the social purposes for which they were enacted. In the area of photocopying, Reproduction Rights Organizations (RROs) are the principal means devised for effective implementation of the law.

Consider for a moment the scope of the photocopy challenge. It is estimated that there may be 5 million published titles throughout the world from which users might wish to photocopy. These titles are produced by hundreds of thousands of publishing houses, which in turn represent several million authors. The works, produced in hundreds of different countries, each with its own system of copyright laws and royalty pricing questions, are written in a multiplicity of languages and often translated into many more. These works are copied by millions of individuals as well as hundreds of thousands of organizations, including libraries, corporations, universities, schools, research institutes and document suppliers. Together, they photocopy billions of copy-pages each year. For many of these users, time is of the essence in obtaining access to the materials.

Clearly, the long established practice of obtaining individual permissions from individual rightsholders through rights and permissions departments scattered around the globe can no longer be expected to handle this enormous task.

THE ROLE OF THE COPYRIGHT CLEARANCE CENTER

Acknowledging this problem, the U.S. Congress, in the mid-1970s, suggested that rightsholders and users work together to develop a system that would satisfy both the users' need for timely access to a wide range of published materials and the rightsholders' appropriate concern about fair compensation for this use of their materials. This suggestion led to formation of the not-for-profit Copyright Clearance Center in 1978. Since then, CCC has developed a variety of licensing programs to meet the needs and requirements of users and rightsholders, both within the U.S. and abroad. Through a coordinated network of bilateral agreements with national RROs in other countries, U.S. users may obtain access to hundreds of thousands of foreign titles, through a collective license with CCC, on terms equal to

**The author recently coauthored a 70-page CCC paper entitled *Toward a Copyright Management System for Digital Libraries*, which addresses those issues. For a complimentary copy of the paper, please inquire of the author at CCC, 27 Congress St., Salem, MA 01970.

those by which they access domestic titles. Similarly, U.S. rightsholders receive royalties via foreign RROs for photocopying overseas by foreign users. These bilateral agreements are based upon the principle of "national treatment" as the fundamental means for reconciling the different licensing nuances in the laws of all the various countries. This system eliminates the U.S. user's need to understand or interact with most foreign rightsholders and foreign licensing idiosyncracies.

RROs now exist in 19 countries, and CCC has executed bilateral agreements with the RROs in the United Kingdom, France, Germany, Norway, Spain, Switzerland, the Netherlands, Australia, New Zealand, Canada and the CIS. Agreements are currently in negotiation with a half-dozen additional RROs.

IFFRO: THE INTERNATIONAL LINK

This international system is supported and strengthened by the activities of the International Federation of Reproduction Rights Organisations (IFRRO), which links all RROs as well as national and international associations of publishers and authors. IFRRO works to facilitate formal and informal agreements between and on behalf of its membership, to foster the creation of other RROs and to increase awareness of copyright and the role played by RROs in the conveyance of rights and royalties.

In recent years, IFRRO initiatives have contributed to changes in the provisions of national copyright laws (Belgium), the establishment of systems for effective observance of copyrights in Japan and a significant change of copyright compliance policy at one of the largest international document suppliers (British Library Document Supply Center) in the world. IFRRO has been extremely active in assisting rightsholders to develop RROs, and a recent series of seminars in Korea, Hong Kong, Japan and India have yielded promising results. IFRRO likewise is working hard to grapple with the complexities of collective licensing in an electronic environment in order that this emergent licensing need be met through a collective mechanism, as and when appropriate. The Copyright Clearance Center takes an active role in all IFRRO activities and, since 1988, has served as its Secretariat.

The basic structures for international exchange of rights and royalties are now in place.

Although technological advances always seem far ahead of the development of systems to manage the far-ranging impact of those technological capabilities, the basic structures for international exchange of rights and royalties are now in place. These systems have indeed simplified the international process and go a long way toward addressing the library professional's concerns about international copyright compliance. By continuing to work together to accommodate the needs of both rightsholders and users, these basic structures can be adjusted, augmented, expanded and refined to meet the challenges of the future.

Joseph S. Alen *is Vice President of the Copyright Clearance Center and Secretary General of the International Federation of Reproduction Rights Organisations (IFRRO). At CCC, in addition to general management, he is responsible for international relations. Mr. Alen is the author of a number of articles on collective licensing of reproduction rights and a frequent speaker at national and international gatherings of authors, publishers and users of copyrighted materials.*

COPYRIGHT RESEARCH BASICS: HOW TO HELP PATRONS LOCATE THE COPYRIGHT INFORMATION THEY NEED

By Joanne D.S. Armstrong

Librarians attempting to assist patrons with questions about copyright will find that even in the absence of access to a law collection a great deal of useful information on the subject can be gathered. One such area of inquiry is the copyright law: patrons may wish to find out if they can safely make a particular use of copyrighted material, or, in the case of copyright owners, to find out if their own rights in material are being violated. Another subject is copyright registration, which comes into play when a patron wishes to find out the copyright status of a particular work. Questions about the latest copyright news arise when patrons wish to keep track of recent developments and trends in order to make informed business decisions. And finally, patrons may wish to obtain the necessary documents for registering a copyright. This article mentions the major resources available outside of law libraries for various types of basic copyright research.

BASICS OF COPYRIGHT LAW RESEARCH

When a patron has a question about the nature of copyright protection in particular circumstances, the search for an answer will involve copyright law. Copyright law in the United States is primarily embodied in the governing Federal statute, codified in Title 17 of the United States Code, which contains the Copyright Act of 1976 and all subsequent amendments. The United States Code, published by the Government Printing Office, is available at many large Federal depositories. There is a subject index to the *United States Code*, but updating is infrequent.

Most patrons will find the annotated, commercially published versions of the Code easier and more convenient to use than the official GPO edition. Happily, the *United States Code Annotated* (published by West Publishing) and the *United States Code Service* (published by Lawyers' Cooperative Publishing) are widely available: large public libraries are likely to have either one or the other. The annotated codes both offer a number of features that make them invaluable research tools, especially for the inexperienced legal researcher with little access to other legal materials. Both contain detailed subject indexes that can guide the patron to the relevant desired section of the statute. Both are frequently updated and incorporate any new material into the relevant statutory sections (both pocket part inserts and separate paperback supplements should always be checked for the latest additions). But the most valuable enhancements in the commercially published codes are the annotations themselves.

Case annotations are brief references to related material where the researcher can look for an explanation of the code's meaning. Most important for a researcher without access to a law library are the case annotations: short paragraphs describing the holdings in cases that interpreted a particular section of the statute. Using the annotations, patrons can locate cases with facts or issues similar to the ones presented by their own questions and can see how the law was applied in such circumstances. Once the citation to a relevant case has been located via the annotations, a patron without access to a law library containing the relevant case reporters can obtain a photocopy of the desired case through interlibrary loan.

Copyright cases are heard in the Federal court system, and so are reported in the *United States Reports* (Supreme Court opinions, widely available at depositories), the *Federal Reporter, Second Series* (Federal appeals court opinions, commercially published and usually available only in law libraries) and the *Federal Supplement* (Federal trial court opinions, commercially published, also in law libraries). The *Federal Supplement* publishes only a fraction of the opinions written in the Federal trial courts; additional copyright cases may be found in specialized reporters such as *United States Patent Quarterly*. When using the annotated codes to locate promising cases, patrons should bear in mind that *United States Code Annotated* only gives citations to the case reporters produced by West Publishing, which includes *Federal Supplement* but not the *United States Patent Quarterly*. *United States Code Service*, on the other hand, provides citations to cases published only in *United States Patent Quarterly* in addition to parallel citations to *USPQ* when a case appears there as well as in *F.Supp*.

Another source for copyright cases is *Decisions of the U.S. Courts Involving Copyright*, a collection of all state* and Federal copyright cases originally printed in the reporters mentioned above. This set, updated periodically, is compiled and published by the Copyright

*These volumes include diverse intellectual property cases arising under state laws.

Office of the Library of Congress. The advantages of this set are that it is quite comprehensive and it is available at large Federal depositories. The disadvantage is that it is several years behind the other collections of cases in currency.

To return to the statutory tools, other features offered by the commercially published codes, in addition to case annotations, include references to related Copyright Office Regulations, to discussions in legal encyclopedias and to legal forms in form anthologies. The *United States Code Annotated* even includes the actual text of the Copyright Office Regulations. However, none of these features are as vital to the lay researcher as are the case annotations. The Copyright Office Regulations are widely available in Federal depositories in Title 37 of the *Code of Federal Regulations*, along with regulations issued by other Federal agencies pertaining to copyright matters. The references to legal encyclopedias and form anthologies are probably not tremendously useful to researchers without access to a law library. Such patrons would be more likely to turn from primary materials to popular works on copyright, such as might be found in large general collections.

A sizable number of such works appeared shortly after the 1976 Copyright Act went into effect, and many of these are still useful. New popular guides to copyright continue to appear each year and are probably worth seeking out in order to ensure that the latest judicial developments have been covered. Nolo Press, a legal self-help publisher, publishes Stephen Fishman's *Copyright Handbook: How to Protect and Use Written Works* (1991), which includes forms as well as narrative explanations of the major topics in copyright. The American Library Association has published works aimed at librarians' particular concerns, such as Mary Hutchings Reed's *Copyright Primer for Librarians and Educators* (1987), which might be useful to patrons with copyright concerns as well.

Patrons can, through citations in court opinions, become aware of various legal treatises on copyright law: such works will generally be available only in law libraries. The copyright law treatise most frequently cited in cases has been *Nimmer on Copyright*, a multivolume looseleaf set published by Matthew Bender. Other prominent titles include William F. Patry's *Treatise on the Fair Use Privilege* (1985) and the same author's *Latman's The Copyright Law*, 6th edition (1986), both published by the Bureau of National Affairs.

Finally, patrons may wish to consult LEXIS and WESTLAW, online legal databases, to aid their copyright research. Both patrons and librarians should take heart: most of the copyright material available online also can be accessed by resorting to paper sources only. For further assistance in locating the appropriate research materials, a good source is Chapter Four, "Copyright Law," in Leah Chanin's *Specialized Legal Research*, published in 1987 in looseleaf format by Little, Brown, and updated from time to time.

BASICS OF COPYRIGHT REGISTRATION RESEARCH

Another frequent concern of patrons with copyright questions is how they can determine whether a particular work is protected by the copyright law or is in the public domain. Answering such questions involves the consideration of many variables, including the date the work was created, when it was published, whether and when copyright of the work was renewed, whether and when a transfer of copyright between owners was effected by contract or by operation of statute, and so forth. The Copyright Office of the Library of Congress publishes a very useful circular entitled "How to Investigate the Copyright Status of a Work," which should be consulted. This circular is updated frequently and is readily available from the Office: write to United States Copyright Office, Library of Congress, 101 Independence Avenue SE, Washington, D.C. 20559; Attention: Publications Section, and request Circular 22. Alternatively, the Circular can be ordered through the Copyright Office's telephone ordering system, described in the final paragraph below.

One of the procedures described in Circular 22 is how to search the *Catalog of Copyright Entries*, published by the Copyright Office and available at some large Federal depositories. The *CCE* is divided into several parts for each period covered and contains entries for works registered with the Office. Renewals of copyright are listed in a separate part of the *CCE*. The *CCE* is currently published in microfiche only, whereas earlier series were distributed in book form. Patrons should be cautioned that it does not necessarily tell the whole story with respect to the copyright status of any particular work. The circular "How to Investigate the Copyright Status of a Work" should be consulted carefully.

BASICS OF COPYRIGHT NEWS RESEARCH

Patrons who wish to keep up with the latest developments in the copyright area can of course do so through the general research resources on government and business activity, e.g., the *Congressional Record* for legislative developments, *The New York Times* for publishing industry developments, and so forth. However, there is a specialized tool that makes keeping current in copyright developments extremely easy and convenient: the *Patent, Copyright, and Trademark Journal*, published by the Bureau of National Affairs, is a weekly newsletter that covers legislative and court developments in an extremely timely manner. This source is generally available only in law libraries.

OTHER COPYRIGHT BASICS

The Copyright Office publishes a variety of useful materials on copyright, some of which have already been mentioned above. Patrons seeking to obtain copyright registration for a work should be referred to the Copyright Office for copies of the necessary forms and the related explanatory materials. The Copyright Office maintains two very useful services accessible by telephone: one offering recorded information, the other an "Order Hotline." The former guides callers through a helpful menu of topics, including instructions about the several forms used for copyright registration and descriptions of many publications of the Copyright Office; it also offers access to an information specialist if the wealth of recorded information does not suffice. (The number is (202) 479-0700). The Order Hotline (7 days a week, 24 hours a day; (202) 707-9100) records and accepts telephone orders for forms and publications. Callers should make sure they have the correct number identifying the form or the publication they wish to order.

Joanne D.S. Armstrong *is Acting Head of Public Services at Columbia University Law School Library and a member of the New York Bar. In five years in the Law Library's Reference Department, she assisted many* pro se *patrons, including litigants in copyright actions. Before joining Columbia, she was an associate at the New York City law firm of Haight, Gardner, Poor and Havens.*

PUBLIC POLICY PERSPECTIVES ON INTELLECTUAL PROPERTY AND THE PUBLIC GOOD

By Michael J. Remington

> "All that in idea seemed simple became in practice immediately complex; as the waves shape themselves symmetrically from the cliff top but to the swimmer among them are divided by steep gulfs, and foaming crests."[1]

The U.S. Capitol and its surrounding buildings, including the Library of Congress, sit on a small hillock of several hundred feet elevation. Not exactly a cliff top, the summit represents the pinnacle of American lawmaking power. The Capitol itself, the seat of the Congress, embodies the ideals and history of this country.

Looking westward across the country, the congressional perspective of copyright law is a serene and symmetrical one. The vista is expansive, the weather clear, but the winds are strong and gusty at times, causing whitecaps to form and waves to break incessantly on the shore. Participants in the complex copyright law system are more like swimmers divided from each other by steep gulfs and foaming crests.

Copyright touches a society's moral, artistic and creative nerves.

Copyright touches a society's moral, artistic and creative nerves, encapsulating a nation's true natural resource: its cultural heritage. From a policy viewpoint, which incorporates the broad notion of the public good, copyright is considered to be a big success story in the United States. On the recent occasion of the bicentennial of this nation's first copyright law, President George Bush proclaimed that legislative expansions of American copyright laws have "enabled fledgling enterprises to become enduring industries" and "the success of new industries has, in turn, given aspiring authors, inventors, and artists greater faith in their dreams and further incentive to share the fruits of their talents with others."[2] The efficacy of copyright is made all the more graphic when compared to the efficacy and fairness of some of this nation's laws that (in the public mind, at least) have failed, such as those relating to the banking and savings and loan industries, criminal justice administration and the health care system.

Copyright industries are among the largest and fastest growing segments of the American economy. The total copyright industries' share of the Gross National Product increased from 3.7 percent in 1977 to 5.8 percent in 1989. The core copyright industries, including publishing, computer software, records and music, and motion pictures, are now larger than either the U.S. agricultural, fishing, mining and energy extraction industries.[3]

Copyright produces a positive balance of trade in the United States, being one of the brightest spots on the deficit horizon. Current American copyright law is touted by our trade negotiators as a model for the rest of the world to follow.

Users are the net beneficiaries. We, as a people, have literally entered a new age, shifting from an industrial to an informational and electronically controlled society. Americans have a bewildering array of consumption choices usually at quite reasonable prices. A casual glance in the modern American library graphically reveals these alternatives. Information may be obtained from traditional hard copies of books, magazines or newspapers; videocassettes of feature films are available for loan and so is music in the form of records, cassettes, perhaps compact disks and, soon, digital audio tapes; photocopying machines normally have a long line of customers as do microfiche projectors with built-in copying capabilities; computer software can be borrowed and taken home or sometimes tried on library premises; computer terminals have become an essential feature of the library reading room in lieu of card catalogues; and facsimile machines are available for on-site utilization. Library users return to a home or office environment equally well-equipped with computer technology and entertainment centers.

The American library is a mirror of copyright history. In the apt words of the Librarian of Congress, James Billington, "the Library of Congress, bursting at the seams with an intellectual outpouring of our creative people, guards the legacy of copyright."[4] All the areas of human intellectual creativity — literary works, music, the visual arts, dance, sculpture, motion pictures, sound recordings, computer programs and semiconductor chip mask works — are deposited in the Library and implicitly made available to libraries and scholars nationwide.

Robert W. Kastenmeier, recognized by many as the consummate copyright legislator,[5] aptly observed that "copyright is a body of law that must accommodate the interests of three groups in our society: authors; distributors (including publishers and entrepreneurs); and consumers."[6] A three-legged stool, which stands or falls based on the relative length of its legs, is the result. Libraries and their millions of users form significant constituent groups for two of the legs: the distribution and consumption of copyrighted works.

Discussion of the requisite balance of the stool legs can be organized conveniently into three distinct headings: (1) constitutional considerations; (2) the political role; and (3) the administration of copyrights. An understanding of these subjects can equip librarians to share their own perspectives more effectively with policymakers.

THE CONSTITUTIONAL INTENT

The framers of the U. S. Constitution assigned to Congress, as the most politically representative of the three branches of government, the role of defining the term of protection and exclusive rights granted to authors in exchange for public access to their writings. The constitutional clause authorizing the Congress to enact a copyright statute reflects the understanding that property rights, properly limited, will benefit the public at large. The source of Congress' authority to enact copyright laws is Article I, section 8, clause 8, which empowers Congress "to Promote the Progress of Science...by securing for limited Times to Authors...the exclusive Right to their Writings...."

The U.S. Supreme Court has regularly and consistently confirmed the requirement of balance between proprietary rights and the public good in the exercise of Congress' constitutional mandate. A bargain, made on behalf of the public, is envisioned. In 1984 the Court stated that the monopoly privileges that Congress may confer "...are neither unlimited nor primarily designed to provide a private special benefit. Rather, the limited grant is a means by which an important public purpose may be achieved."[7] The intellectual property clause, to quote from a unanimous Court decision in 1989, "reflects a balance between the need to encourage innovation and the avoidance of monopolies, which stifle competition without any concomitant advance in the 'Progress of Science and [the] useful Arts.' "[8] Just last year, the Court reiterated that "the primary objective of copyright is not to reward the labor of authors but [t]o promote the 'Progress of Science and the useful Arts.' "[9] The framers fully intended copyright to be the "engine of free expression. By establishing a marketable right of the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[10]

THE ROLE OF CONGRESS

The legislative perspective visualizes a much broader vista than that seen from a librarian's desk, lawyer's window, or judge's bench. It is particularly well-suited for consideration of statutory reforms that relate to the creative aspirations and artistic genius of a country and affect the population at large. Legislators can be aptly characterized as the "last generalists." Being representatives of the people, they are elected to make daily decisions in the form of votes on a wide variety of issues that involve the balancing of diverse interests. The balance that copyright law strikes between the incentives to authors that are necessary to stimulate desired creative activities and the freedom to use protected works rests on the collective political judgment of the elected representatives. To give more protection than is necessary is not a good bargain for the public. To give less protection grants more liberal access to users, reducing the incentive for creativity. The judgment is not easy, but it is done whenever Congress acts on a copyright reform measure. As described by Stanford law professor Paul Goldstein, "every time Congress amends the Copyright Act it makes a value judgment about the quantity and quality of literary, musical and artistic works that are socially desirable and an empirical judgment about the amendment's probable efficacy in achieving that end."[11]

Perhaps the principal leavening ingredient in a democracy is the legislative process itself. The procedures are open to the press and the public. Legislative proposals are introduced, noticed in the *Congressional Record*, which is printed daily, and made available through a document room or electronically. The main informational technique used by the Congress is the public hearing. Working through a subcommittee chairman, witnesses are invited to give a short statement and answer questions about a particular subject. Legislative hearings vary in scope from a narrowly focussed bill to a more comprehensive analysis of a general subject matter. The promotion of understanding by the elected officials and the stimulation of debate are the underlying goals. When bills are processed legislatively (that is, marked up), the procedure again is open to the press and the public at every legislative stage: subcommittee, committee and the full body in both the House and Senate.

In the legislative context, the most difficult problem for a congressional subcommittee is how to define an issue. Congress does not have a "case or controversy" requirement, unlike courts, and it need not restrict itself to consideration of a specific bill. After all, the proponent of a legislative measure may control the outcome. To characterize an issue is to decide it. Often, a wiser political course is to begin with a general survey of a subject area.

Congress must assess the character of new technologies before restructuring the legal system to accommodate change.

Copyright law reform in a rapidly changing society is a difficult, but not impossible, one. To the extent possible, the legislative process should produce statutes that are uniform, consistent and understandable. Unnecessary transactional costs should be avoided. In a time of ever whirling change, Congress must assess the character of new technologies before restructuring the legal system to accommodate change. Many legislative proposals sorely test the ability of the Congress to understand technological changes and to rechannel them into the legal system and national economy. One-stop electronic shopping for government documents is technologically feasible. Congress, however, must decide how and under what conditions it should operate. Last year, Congress established a legislative framework for the National Research and Education Network, which will clearly have an impact on science and mathematics and may have consequences (some unintended) for education and libraries. Copyright implications have yet to be explored by all the affected communities and proper congressional committees.

Currently, the societal tensions are high, the economic stakes are great, and the legal issues are complicated. In the future, Congress may increasingly be pressured to formulate different answers to different problems. Moreover, Congress may be obligated to rely on different procedures and methodologies of law reform. Most of these methodologies are time-tested, such as private party negotiation, study commissions and omnibus revisions. New methodologies also may develop, and the role of the private sector will become more significant.

Considerable statutory balances (the three-legged stool) are already woven into the fabric of the American copyright law. The constitutional backdrop is, of course, originality and a limited term requirement. Copyright is available for a broad variety of creative expressions, but copyright protection does not extend to ideas, processes, methods of operation, concepts, principles, or discoveries, regardless of the form in which they are described, explained or illustrated. Furthermore, copyright protection is not available for any work of the United States government.

Generally, authors are granted a bundle of exclusive rights to reproduce, prepare derivative works, distribute copies, perform and display publicly. However, exclusive rights are limited by the "fair use" doctrine, which confers a privilege on the public to use copyrighted material in a reasonable manner without the copyright owner's consent. Exclusive rights are further limited, for example, by allowing libraries and archives to reproduce a copy of a work and to distribute it under certain conditions. As regards library photocopying, the message is clear: a balance is sought between the rights of creators and the needs of users."[12]

Distribution interests — from book publishers to recording companies, from satellite delivery systems to television broadcasters, from cable television owners to jukebox operators — have sought and obtained legislative confirmation of their rights.

The search for equilibrium is extant today and will continue in the future. As aptly observed by Congressman Kastenmeier, "consensus will be the rule rather than the exception."[13] This is not just idle chitchat. Congressional reluctance to impose one-sided losses on either the author, distributor or user side of the triangular equation has its antecedents dating far before the current generation of elected representatives. Political compromise is a product of the democratic political system itself and an essential contributing factor to legitimacy, or public acceptance, of the law.[14]

THE ROLE OF THE COPYRIGHT OFFICE

An important copyright institution, the U.S. Copyright Office plays a crucial role both in serving the needs of the public and promoting proprietary interests. In 1870, the Congress delegated authority to the Library of Congress to administer U.S. copyright law. In 1897, the Library recognized the growing societal importance of copyright and established the Copyright Office to register copyright claims and create a public copyright record.

The Office not only administers the copyright law, it also advises Congress, the courts and the executive branch (including the Office of the U.S. Trade Representative) on copyright law and policy. Further, the Office provides Congress with information and advice on copyright bills, prepares extensive reports on specific policy issues and drafts legislation at the behest of members of Congress. The quality of its service and advice is not dependent on whether a specific legislative proposal is pro-author, or pro-user, or balanced between the two.

Under the Copyright Act of 1976, as amended by the Berne Convention Implementation Act of 1988, copies of all works published in the United States for which copyright is claimed are required to be deposited in the Copyright Office. These deposits are made available to the Library for its collections. As a consequence, copyright deposits fuel the resources of the Library as it builds and nourishes itself. The value of these Copy-

right Office acquisitions amounts to approximately $10 million annually.

The current Register of Copyrights is a veritable lifeguard. The location of the Copyright Office in the Library of Congress — a user-friendly environment — coupled with the overall mission of the Office to promote the copyright law, place the Register safely on shore, but overlooking sometimes troubled waters. Tension no doubt exists. But from this tension constructively rises America's national library, which serves this country so well.

The United States has relied upon a political utility approach to copyright.

CONCLUSION

In the United States, the Constitution does not establish copyrights; rather it authorizes the Congress to grant such rights if, in its political judgment, a meritorious public purpose is to be achieved. During its two centuries of independence, the United States has relied upon a political utility approach to copyright. Derived from both the express words of the Constitution and the delegation of authority to the political branch, this methodology promotes a balancing of interests between authors and users. As Lord Macaulay observed before the English Parliament more than 150 years ago, copyright "is neither black nor white, but gray."[15]

Today, based on its economic and societal importance, the subject of intellectual property is a prime piece of jurisdictional real estate in the Congress. The congressional subcommittees with expertise over copyright matters are in good hands with strong leadership coming from Representatives William Hughes and Carlos Moorhead in the House of Representatives and Senators Dennis DeConcini and Orrin Hatch in the Senate.

Copyright law being largely self-executing, there is the need for a corps of public servants to administer various governmental obligations. The Copyright Office, located in the legislative branch, plays a key role in effectuating the will of the Congress, contributing to copyright law improvements and delivering services to the public. Congressional staff play a pivotal part in the law drafting process as do executive branch staff in bilateral and multilateral trade negotiations.

In the final analysis, copyright law exists as an economic incentive for authors to create and to share the fruits of their labors in a complex ecosystem affected by the marketplace, public opinion, judicial decision-making, trade negotiations, library and educational policies and business investments. Most assuredly, copyright law is in good shape and in good hands. It may seem complicated at times, particularly to those swimming in the system against the tide. But, on balance and from the top of the cliff, copyright successfully promotes the progress of science and the useful arts in an enormously creative and vibrant country to the benefit of all of us.

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Michael J. Remington *is Director of the National Commission on Judicial Discipline and Removal, a temporary Federal agency asked by Congress to study and file a report on the discipline and impeachment of Federal judges. Before he was appointed to this position in January 1992, he served for eight years as Chief Counsel of the House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice. He has held high-ranking positions in all three branches of the Federal government, is a former Fulbright Scholar (in France) and previously served as a Peace Corps Volunteer (in the Ivory Coast). He has lectured and written extensively on copyright law and the Congress. This paper is derived in part from a speech he made in July 1991 about intellectual property to a training course for developing countries of Asia and the Pacific organized by the World Intellectual Property Organization in Colombo, Sri Lanka.*

WHAT REFERENCE LIBRARIANS NEED TO KNOW

By Deirdre C. Stam

It is all too easy for library educators to lose track of the needs of librarians actually employed in the front ranks of library work. An area most susceptible to educational lapses is reference work: a function marked by constant change. In an effort to keep track of the needs of reference staff and to revise library school curriculum appropriately, an informal investigation was undertaken during summer 1991 to find out what reference librarians need and want to know in order to do their jobs well.

Three basic questions were posed to reference librarians in various types of libraries: what skills and knowledge are important in their work; how did they develop these competencies; and what is the proper role of educational programs in developing these abilities?

Soliciting opinion from practicing librarians about the appropriate education for librarianship is by no means a new method of gaining insights for developing library school curricula.[1] The reflective aspect and conversational tone of the inquiry are, however, somewhat novel for this field that has shown enthusiasm in recent years for statistically based survey methodologies. In this study, the number of interviewees is small, and the answers from participants are, inversely, lengthy and often quite personal. In open-ended structured interviews, respondents were encouraged to reflect on their professional experience and impart their thoughts, opinions and wisdom.

Enthusiasm for polling practitioners about library education is not unanimous, however. Herbert White, for example, states flatly that it is of little use to ask practitioners what they think library schools should teach, since practitioners do not understand the constraints operating in library school programs.[2] Admittedly, practicing librarians are not in a good position to decide exactly what skills should be taught in which course, for how long and in what depth. It is not course design, however, that is explored in this investigation.[3] What was sought here is advice on broad areas of knowledge and approaches that will serve aspiring reference librarians in good stead when they enter the profession.

THE DEBATE

How should librarians be prepared for reference work? The two best known approaches can be described simplistically as "the teaching of sources" ("tools, titles, books, materials") versus "the teaching of skills" ("competencies, methods"). As early as the 1920s, according to Samuel Rothstein,[4] the teaching of reference skills had stabilized into extensive reviews of reference titles, and students were given lists of sample questions which were to be answered by using the titles studied. One of the few innovations in the two generations to follow was the understandable specialization in subject areas covered as new reference "tools" emerged.

A spirited debate over method developed in 1964 when Wallace Bonk and Thomas Galvin squared off in an issue of *Library Journal*, with Bonk supporting the title-by-title approach and Galvin advocating study of the "encounter" of patron and reference librarian.[5]

In fact, other approaches to the teaching of reference skills exist, though they are less clearly and less frequently articulated. One could be characterized as teaching "types, not titles." Another approach combines several approaches, including the study of bibliographic organization and the solving of reference problems. Innovations in years subsequent to the Bonk-Galvin debate have included the creation of "pathfinders,"[6] the creation of flow charts to represent the subsequent steps of the reference process and role playing. Two more recent developments have included instruction in the use of new information technologies, and the expansion of practical experience through internships, observation, analysis of user behavior and self-directed study.[7]

More recently, great emphasis has been placed upon the "communication" aspect of reference work. An extension of this trend was the proliferation of courses relating to indirect reference services such as bibliographic instruction, information and retrieval services, and online searching of bibliographic databases. Other recent suggestions about appropriate concerns have included the consideration of ethical issues,[8] the relativism of "correct" answers,[9] and internationalism.[10] One sees, too, a call for more extensive subject knowledge.[11]

DESCRIPTION OF THE INQUIRY

This informal inquiry was intended to elicit opinions from a group of experts, that is, practicing reference librarians. Encouraged to reflect on their experience,

these experts were guided through a series of questions that explored the nature of necessary skills and knowledge, the process of acquiring these competencies, and opinions about educational preparation. This inquiry is here described in terms of behavioral studies, although it should be understood that no claims are made for adherence to a strict scientific methodology.

The sample consisted basically of six librarians whose major responsibility is reference service. In fact, the sample expanded to 10 librarians, when other librarians who had heard about the impending interview decided to participate in the discussion. Of these 10, 8 were female; 2, male. Although interviewees were not asked to indicate their majority/minority identification as to family background, observation and discussion indicated that almost all fell into the traditional "majority" category.

The settings in which these librarians work included one large public library, one small public library, a college library, a university library, a community college library and a special (medical school/hospital) library. (School libraries are not represented here since it was assumed that their unique populations and mandates would require a parallel but somewhat different inquiry.)

All librarians interviewed work in the region of Syracuse, New York. The homogeneity of geographical locations is an interesting detail mainly for the degree of "control" it represents. Differences among responses from the subjects presumably reflect other differences such as type and size of library. The sample is far too small to support correlations. The degree of geographical homogeneity could bias the investigation if most librarians were graduates of a single local library school, but that was not the case in this sample. The sample is representative of this peripatetic profession, with a variety of library schools and a diverse set of previous library jobs and locations reported.

As for other elements of the subjects' profiles, they are highly disparate. The years since graduation from library school ranged from 2-21 years and were quite evenly dispersed throughout the range. The librarians interviewed spoke anecdotally of a variety of subject interests and academic backgrounds. Ages varied widely, with some relatively "new" M.L.S.s seemingly approaching the traditional age of retirement. (It should be understood that no attempt was made to elicit parallel quantitative data on these librarians' lives and experience; such an inquiry would have altered the nature and tone of the discussions and very probably inhibited free exchange of ideas.) In short, the participants seemed to be a typical set of 10 American librarians as far as could be ascertained from conversation. They were chosen at random (by telephone calls to the heads of reference departments), and they seemed — from information delivered in informal conversation — nicely to fill the requirement of "randomness" within a representational structure. With a sample of only 10 voices, one should not, of course, try to make stronger claims of representation and randomness.

Data were collected in structured interviews over a six-week period in early summer 1991. Each interview took approximately one hour to complete. Almost all data were qualitative in nature. Almost all questions explored the memories and opinions of those contacted. It was assumed that the subjects were able to recollect accurately, synthesize their experience coherently and express what they meant. These are large assumptions, but reasonable in light of the recommendations of supervisors. These assumptions of articulateness, honesty and expertise are necessary to this kind of inquiry where one looks for the wisdom of practitioners engaged in a largely cerebral activity. While there is no guarantee that these qualities were present in all cases, there is no reason to suspect that any of the participating librarians lacks these attributes.

The questions posed were few in number in order that the interviews not extend much beyond the available time. Most were exploratory in nature and functioned as devices to open conversation upon a variety of topics. The topics explored were prompted mainly by the investigator's need to reassess what to teach in an introductory reference course and what to encourage having taught in related parts of the curriculum. Some reflect issues in the literature, but no attempt was made to imitate other studies of these issues in order to get comparable data.

The questions were these:

1. What are your responsibilities as reference librarian?
2. What skills do you need to perform these tasks?
3. Where and how did you learn these skills?
4. What part did library school play in the development of these skills?
5. What parts of these skills were obtained through other means? Where should they be learned?
6. Is the M.L.S. is essential for your kind of work?
7. How do you foresee your job changing in five years?
8. Do you have ideas, observations, or concerns about library education for reference work?

Some of the wording and groupings of questions in the interviews were presented in slightly different form from those described here. Changes were dictated by the informal rules of conversational development.

THE FINDINGS

In order to capture the flavor of the exploratory conversations, the remarks of participants are quoted and summarized in considerable detail. Thus, the librari-

ans are allowed to speak. Differences in opinion are noted, and even intensity of feelings is occasionally indicated.

What are the responsibilities of reference librarians? The major areas of responsibility, in addition to "desk duty" (that is, the answering of questions at the reference desk), reported by these reference librarians are very broad and vary from one librarian to another. Bibliographic instruction in the broadest sense emerged as a major activity in all libraries, except possibly in the large public library. Verifying citations, it was observed, is an ever-growing activity, now linked to ready access to bibliographic databases and requests for document fulfillment. Supervision of paraprofessional workers was quite common. Beyond that, responsibilities include selection of government documents, maintaining pamphlet files, conducting online searches, serving as liaison to the financial aid program for an academic institution, giving book talks and adult programming for a public library. These reference librarians selected materials for a wide variety of disciplines and fields: medicine, women's studies, humanities, fine arts, English literature, philosophy, social work, child and family studies, and other areas and genres.

What skills do reference librarians consider essential to meeting these many responsibilities? From the list of suggestions presented, these reference librarians chose "knowledge of local collections" most frequently as an essential skill or kind of knowledge. Close behind were a general knowledge of reference materials, techniques to define the patrons' needs and formal bibliographic instruction techniques. Knowledge of local services came next, with these other skills mentioned: knowledge of the whole (parent) institution, writing skills, evaluation techniques for reference materials, personnel skills, knowledge of online sources and the ability to advise readers on material selection. One librarian strongly stressed the desirability of "taking charge," that is, exercising leadership skills in both the home institution and in the profession at large.

Two additional topics inspired considerable discussion. The first, because of the length of time devoted to it in the interview and the degree of passion aroused by it, is the need for teaching techniques. It was observed variously that almost all public contact involves some degree of teaching, and more time is needed to learn new tools in order to be able to teach them properly. Some respondents wrapped all reference teaching into bibliographic instruction, but others insisted that the topic was much broader than that traditional appellation indicated. This topic came up again in response to other questions posed.

The second topic leading to extensive discussion was management skills. Some of the skills mentioned above are a part of the set needed: leadership, personnel skills, writing ability and analytical techniques. Respondents spoke of the need to prepare annual reports and to gather and analyze pertinent data for these reports. Some spoke of their surprise and dismay upon first encountering requests from library management for reports on their reference activities.

Where and how and when did reference librarians develop these skills? On the job! This answer was unanimous. While a few interviewees referred to significant jobs prior to their M.L.S. programs as significant, most thought that it was primarily post-M.L.S. employment that had given them the practical view they needed. Library school internships, too, were cited as quite useful in this process of developing reference skills. While library school acquainted some with reference materials (and advanced literature courses were mentioned specifically), it did not give them the confidence they needed to do the job in a professional manner. That came from observing in the work place and from the actual experience of doing reference work.

How do librarians keep up their skills? Almost all reported that they read the professional literature assiduously. Several expressed great enthusiasm for the workshop format, though one person specified that the workshop must be very well done to be worth her while. Formal courses seem to be an impractical solution for most practicing librarians, with cost cited as the inhibiting factor. Two people mentioned that they attend conferences for this purpose and benefit most from talking to other attendees.

A few novel suggestions turned up. One person learns about new sources and services from listservers. Another expressed interest in having staff members teach others about new tools in the course of reference staff meetings.

Almost all respondents began their response with the complaint that they do not have enough time to keep up. New technology, in particular, is making demands of librarians that they cannot meet due to the overcommitment of their time.

What should the employer do to help reference librarians improve or update their skills? "Provide more time for learning," responded almost every participant. The more obvious desire for more financial support for conferences was expressed, though less consistently, and almost always in connection with the plea for more time for self-study.

The provision of expert training in new technologies would be helpful to many. A regular program of such support would be very useful. One librarian expressed an interest in exchanges of librarians with other institutions and in visiting other libraries as an observer. Released time for such activity is needed, she observed.

Several librarians expressed interest in short sessions (e.g., four-hour courses) on new reference tools acquired by the library. These sessions could be con-

ducted by reference librarians for the benefit of one another.

One interviewee complained that she is offered more continuing education opportunities on the job than she wants or needs; what is essential to her are concentrated programs of very high quality. Too many programs, she observed, are abysmal.

There was some discussion in almost every setting about exchanges between the technical services sections and the reference departments. Several librarians deplored the separation, but admitted that they did not know how to bridge the gap. A knowledge of cataloging principles and practices was cited frequently as extremely important, as was communication with catalogers about users' needs and preferences.

What parts of the reference job could be done by persons without the M.L.S.? "Most of it," replied one public librarian. "Much of it," replied some others, with these qualifications: others can take on this function if they have been trained by a professional librarian, or if they have been clerks under supervision for a period of time. Several libraries now use students or other paraprofessionals at the reference desk.

People with computer skills could take on some of the burden of maintaining CD-ROMs and other equipment in the reference area. Those with subject training could do some of the rare historical investigations, or inquiries into research methods. One conjectured that someone with teaching skills could be useful in structuring and even teaching formal bibliographic instruction sessions.

One librarian contended that online searching could be done by someone with this specific training. Education in the structure and the language of the database, in particular, is appropriate for paraprofessional searchers, she observed. In contradiction, another librarian stated flatly that online searching required the ability to analyze and negotiate the question, and these are skills that come with the M.L.S. and professional experience.

There were strong opinions expressed about what should *not* be done by those without the M.L.S.: teaching and collection development.

This question gave rise to observations about the nature of the M.L.S. One librarian stated that he could not easily define the reference skills held by the professional librarian, but he could clearly see when someone attempting reference work lacked these skills. In part, these skills increase the efficiency of the reference process. In larger part, they enable the reference librarian to understand the question accurately and to communicate the answer effectively. Others, not having M.L.S. training and experience, can easily be taught where to look up answers; that is the simple part. Another librarian observed that excellent reference service requires a service ethos that comes with professional orientation. A third librarian explained that reference work is teaching, and that is basically a professional activity. "All I do is teach!" she stated emphatically.

What role do reference librarians think that their library school experience played in developing their reference skills? Particularly eloquent was a public reference librarian: "Library school taught me how the profession is organized — the whole system — and how to use that system to answer questions."
It made me aware, said another, of all the resources and how to be organized in approaching them; it taught me to read directions! Others spoke of getting an overview of the profession, becoming acquainted with organizations and leadership, developing a sense of "openness," making connections within the profession, developing a user orientation, gaining practice in using reference tools, getting a view of the total picture of reference work and learning that reference work has a history and a philosophy.

Memorizing titles, commented one librarian, was not a useful part of her library education. In apparent contradiction, others noted that learning about specific tools from using them in library school exercises — particularly for verification of citations and for ready reference — has served them well.

Somewhat surprising, in light of the skepticism reported by many writers in this genre,[12] the librarians interviewed here generally indicated in their responses positive attitudes toward their library school experience.

How do reference librarians foresee their jobs changing over the next five years? Two topics dominated this discussion: technology and teaching.

New technologies, it was surmised, will involve reference librarians more deeply in access issues. Communications devices, added to the now common public access catalogs and CD-ROM products, will make librarians responsible for a wide range of new technical and policy issues. Electronic networking will be commonplace.

These new technologies are expected to cause changes in the physical layout of the reference section and, in turn, will cause differences in the way reference librarians relate to their public. There may be less contact over minor matters of circulation and direction giving; the effect of this distancing is difficult to anticipate. It may not be an altogether good thing to lose informal and regular contact, particularly in special library settings where personal relationships are an assumption of the institution.

When most sources are available on screen, it will be all the more necessary to make clear to users just what is represented in the database at hand. New technologies will require new and better teaching.

Almost all respondents expect that teaching duties will increase. In the community college setting, it is expected that there will be an increase in students, due

to a complex of cost factors and a broadening of diversity. New ethnic, economic and social groups will make up the client base, and new ways of communicating must be developed for these users. Another librarian was more specific in the teaching devices she will be developing: training manuals, team-teaching sessions with faculty, and using communication media to reach and teach clients. It will be increasingly necessary, also, to enable users to learn on their own.

What should library schools be teaching to prepare students for reference work? The list is a long one: teaching techniques, new technologies, indexing and abstracting theory, the historical contexts of libraries with emphasis upon their role in higher education, management techniques, research techniques and the nature of the publishing industry, practical experience at reference desks, and practice in using library materials in assignments that students define for themselves. Useful for the public library setting would be the study of techniques for dealing with problem patrons. The point was made repeatedly that new problems and issues crop up continually, and one must be prepared to be able to deal with them rationally and competently.

As has occurred elsewhere in this account, the topic of teaching loomed large. These librarians reported having to make presentations to large groups of professional nonlibrarial colleagues from the very beginning of their careers. By and large, they felt ill-prepared for these assignments. Among the kinds of training needed, they contended, were public speaking, the design of "lesson plans," teaching techniques and evaluation methods, the preparation of graphic illustrative material and adjusting communication modes to suit new kinds of users.

Suggestions of a fundamental nature centered on the need to unify public service training with technical service preparation. In this vein, training in classification theory was seen as extraordinarily useful by one librarian. Another comment, with far-reaching implications, was the observation that librarians are expected by the profession to carry out research on in-house problems, report findings and publish the results of both these practical projects and more general investigations. Very few librarians are properly prepared for these activities, and those who are cannot find the time to carry out this professional obligation to the degree required by their employers. "We lack discretionary time and skills to do research," complained one librarian. What she implied was needed was not just an alteration in the library school curriculum, but an alteration in the structure of reference jobs themselves.

While the desire for more time was the expressed need, one might interpret these statements as indications that these librarians need better time-management skills, more time-efficient techniques for self-study and increased understanding of the managerial implications of reallocation of time.

CONCLUSIONS

As for the skills and knowledge necessary for reference work, these librarians reinforced some traditional ideas. They spoke of both the need for acquaintance with bodies of knowledge (e.g., reference tools and general collections, information theory, philosophical issues, and information agencies and other sources), and with processes (e.g., communicating, teaching, analyzing, evaluating, planning and managing).

Regarding the second major topic, the development of these skills, these librarians stressed the importance of "on the job" learning and the desirability of continuing education. Considerable enthusiasm was expressed for brief workshops and in-house training sessions.

As for the role of library schools in job preparation, several of these librarians regarded their library school experience as valuable for laying the groundwork for understanding how information is processed and how the information world is organized. While opinions about using specific tools was mixed, much enthusiasm was expressed for simulated and practice reference experiences.

So far, these conclusions are fairly predictable and serve to some extent to validate approaches to the teaching of reference work that are now commonly found in library schools. In the course of discussing these time-honored topics, however, some significant new ideas emerged.

The reference librarians interviewed called repeatedly for three sets of skills that were in almost all cases not available to them as part of their formal training. Needed urgently for modern reference work are skills in teaching, learning and analyzing. Regarding analytical skills, participants cited the need for specific knowledge of evaluation, measurement and quantification in general. In fact, in relation to each of these newly required skills, librarians called for detailed instruction in techniques borrowed from fields allied to librarianship, such as education, philosophy (epistemology), computer science (for electronic information media) and mathematics (especially statistics).

Behind the call for new skills in teaching, learning and analyzing, one can perceive the theme of constant change. These skills are particularly necessary for reference librarians who are now facing the ongoing development of new reference sources which they must learn themselves, the rapid changes in knowledge bases which they must teach to users, and the phenomenon of change itself which they must be able to describe, measure and evaluate in order to make the decisions that support their basic mission, which is to answer the questions of their clientele.

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Deirdre C. Stam *is Associate Professor at the School of Library and Information Science, Catholic University of America, where she teaches reference services and organization of information. Dr. Stam is current Vice Chair / Chair Elect of the Art Libraries Society of North America. She received her Ph.D. from Columbia University.*

THE WHITE HOUSE CONFERENCE ON LIBRARY AND INFORMATION SERVICES TASK FORCE (WHCLIST): A PERSONAL VIEW

By Helen F. Flowers

The White House Conference on Library and Information Services Task Force (WHCLIST) is a national organization that supports libraries of all kinds. It came into being as a result of a resolution adopted at the first White House Conference on Library and Information Services in 1979. From the start, New York played a major role in the development of WHCLIST. The Task Force benefitted from the leadership of New York representatives Laura Chodos and Lucille Thomas. Regent Chodos was chair of WHCLIST from 1982-84; from 1982-86, GladysAnn Wells and State Librarian Joseph F. Shubert collected information from each of the states and territories to track the results of the Conference annually.

The current WHCLIST membership numbers more than 700 and is made up of 2 representatives — 1 lay and 1 professional — from each state and territory; the heads of state and territorial library agencies; and individual, corporate and organization members. Membership is open to all; annual dues for individuals are $10.00. Members receive the WHCLIST newsletter and may attend annual conferences.

I had read about WHCLIST in the library press, but did not have much knowledge about the organization until 1986, when, as First Vice President of the New York Library Association (NYLA), I heard Daniel Casey of Syracuse, a member of the National Commission on Libraries and Information Science (NCLIS) and a member of NYLA Council, report on how plans were developing for the Second White House Conference. During my NYLA presidency, Mr. Casey and I talked about how NYLA could be involved in a Governor's Conference on Library and Information Services in New York, and the idea grew that a NYLA committee should be created and charged with working to bring about a New York Governor's Conference. NYLA Council approved the formation of the committee in late 1987, and I served as the chair.

LEARNING FROM WHCLIST

Mr. Casey had suggested that the WHCLIST annual conference, meeting in Minneapolis in 1988, might provide useful information for the committee, so I joined WHCLIST and in August went to Minneapolis, along with several other New Yorkers, including Roberta Cade, who represents the State Librarian in WHCLIST. Since then I have attended WHCLIST conferences in Portland, Oregon, and in Nashville, and have learned much. The focus of these three conferences was on state, regional and national preparation for the 1991 White House Conference (WHC).

There were conference sessions on funding state conferences, ways to select WHC delegates, techniques to use in training delegates so they would arrive at the WHC knowledgeable in the working of such a conference, how to involve people at the local level in the conference process, how to prepare resolutions and many other topics.

WHCLIST conferences are not all work. Meal times provide opportunities to visit with other delegates, and a social evening is usually part of the schedule. The evening activity was a dinner on a river boat at the Tennessee meeting, and, in Oregon, a meal under the stars at a winery.

At every WHCLIST conference members share information about activities in their states, report on their successes and seek ways to deal with problems. Conference participants meet in regional groups where they discuss common concerns. The northeast regional group sponsored a regional meeting of WHC delegates to provide preparation for activities in Washington. This regional meeting took place in April 1991, in Plymouth, Massachusetts, where several hundred WHC delegates came together.

At ALA Annual Conference and at Mid-Winter, WHCLIST schedules sessions where there are informal reports on state activities as well as information on what is happening in WHCLIST.

THE FOCUS SHIFTS

With the second White House Conference behind us, the focus will now shift from preparation for that conference to monitoring the implementation of WHC recommendations. There will be increased emphasis on communicating with legislators and on how to most effectively advocate improved library services.

WHCLIST is committed to ensuring the best possible library service to all people. WHCLIST members have testified at local and national hearings in support of library legislation, and they have helped found local and statewide library groups.

WHCLIST takes an active role in:

- Promoting literacy, books and reading
- Helping to provide access to library and information services for all Americans
- Promoting the potential of technology for efficient and cost-effective delivery of library services
- Advocating increased library funding locally, statewide and nationally
- Providing leadership for library issues
- Planning for future library and information issues
- Honoring outstanding legislators, library advocates and publications with WHCLIST awards
- Publishing newsletters

As WHCLIST moves forward, Roberta Cade, John O'Rourke and I welcome the involvement of other New Yorkers. We invite you to become a participant in the White House Conference process by sending your check for $10.00, payable to WHCLIST, to Charles E. Beard, Vice-Chair, 105 Briarwood Drive, Carrollton, GA 30117.

Helen F. Flowers *is Librarian-Media Specialist at the Bay Shore High School. She is a former president of the New York Library Association and has served as a member of the Regents Advisory Council on Libraries. In July 1991, the New York delegation to the White House Conference elected Dr. Flowers as professional delegate and John R. O'Rourke of Fulton as lay delegate to WHCLIST.*

COMING IN *The Bookmark*

The next issue of *The Bookmark* will examine library roles in literacy. The issue will be titled "Beyond Decoding: Literacy, Libraries and the Year 2002."

RECENT ISSUES

Fall 1991	School Library Media Program Connections for Learning
Summer 1991	Perspectives 1991
Spring 1991	Family History Resources
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Fall 1990	Imagination and the Magic of Libraries
Summer 1990	Law Library Service in the 1990s
Spring 1990	Conference Briefs
Winter 1990	New York Library Association Centennial
Fall 1989	Library and Information Science Education for an Information Society
Summer 1989	Perspectives 1989
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READING IS A RIGHT!

The First Amendment to the Constitution states that, "Congress shall make no law...abridging the freedom of speech or of the press...." With this in mind, The Children's Book Council commissioned Felicia Bond, award-winning illustrator of *If You Give a Mouse a Cookie*, to create a poster urging young children to celebrate their freedom to read.

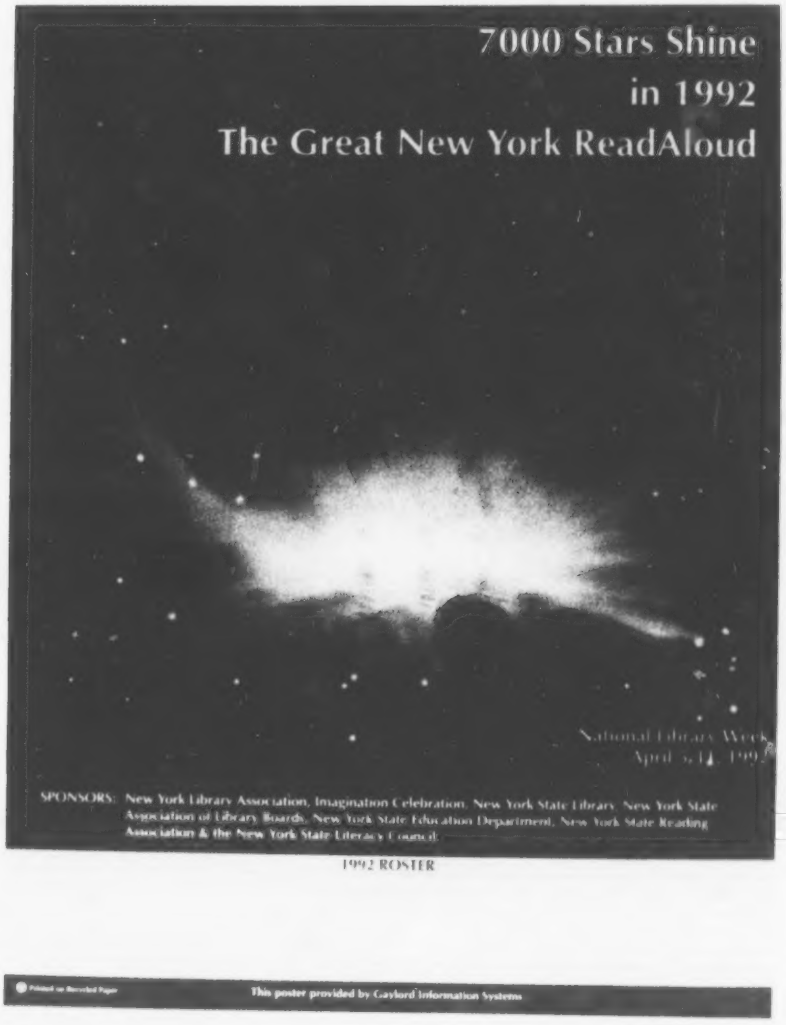
The 17" x 22" full-color poster shows Bond's charming mouse shouting his right to read to a cheering crowd of book-toting fellow mice. Perfect for display in libraries, schools and early childhood education centers, READING IS A RIGHT! can be featured during Banned Books Week celebrations September 26-October 3, 1992, and is an effective reminder any time of the year of the importance of the First Amendment.

READING IS A RIGHT! is available for $4.95 prepaid. To order, send a check or money order, payable to The Children's Book Council Order Center, 350 Scotland Road, Orange, NJ 07050. Schools, libraries and other institutions may be billed for orders over $25.00 when accompanied by purchase order or official letterhead.

For further information about READING IS A RIGHT! and other reading encouragement materials including Book Week 1992, send a business-size (#10), stamped (1 oz., first class), self-addressed envelope and a request for "Fall 1992 Materials Brochure" to The Children's Book Council, 568 Broadway, Suite 404, New York, NY 10012.

The Children's Book Council is a nonprofit association of 66 children's and young adult trade book publishers. It is also the official sponsor of National Children's Book Week. Proceeds from the sale of materials support the Council's projects that promote literacy and encourage the reading and enjoyment of books among young people.

The Great New York ReadAloud Celebrates Reading and Libraries


7000 Stars Shine
in 1992
The Great New York ReadAloud
National Library Week
April 5-11, 1992
SPONSORS: New York Library Association, Imagination Celebration, New York State Library, New York State Association of Library Boards, New York State Education Department, New York State Reading Association & the New York State Literacy Council
1992 ROSTER
This poster provided by Gaylord Information Systems

The annual celebration is part of the national Great American ReadAloud, the country's largest literacy event. It is held during April as part of National Library Week.

In 1991, New York called its second ReadAloud the Night of 7,000 Stars — for the State's 7,000 libraries. About 2,000 school, public, academic and special libraries invited celebrities and other guests to read aloud from their favorite books. Readers told how reading and libraries helped them succeed.

The audiences, estimated at 400,000 statewide, called the program "magical," "thought-provoking," "entertaining" and "inspiring."

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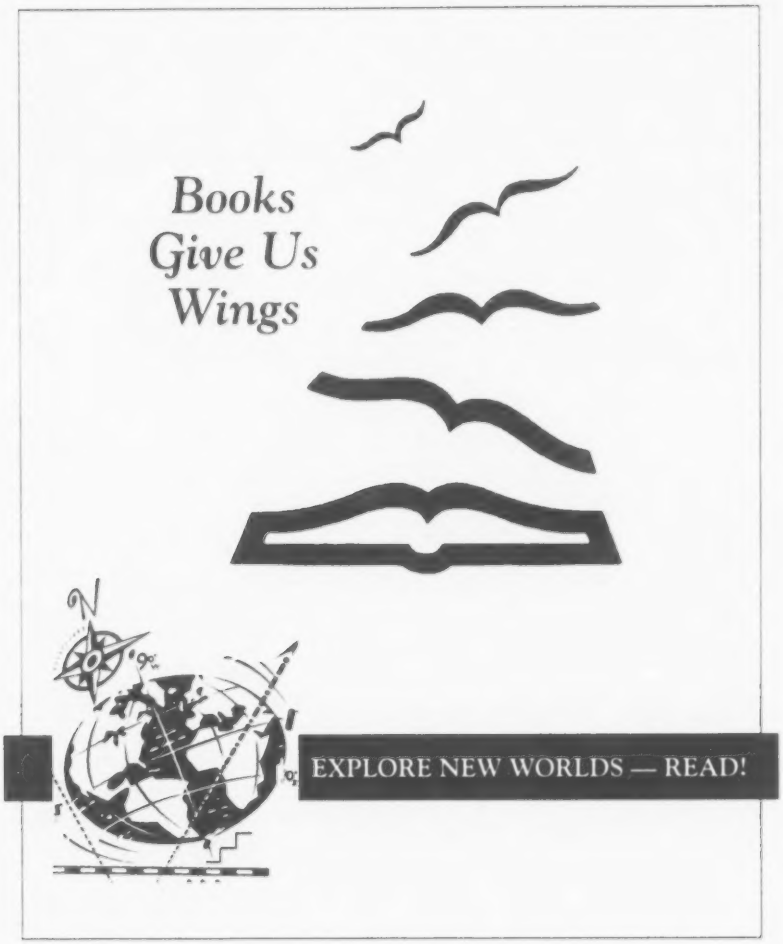

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